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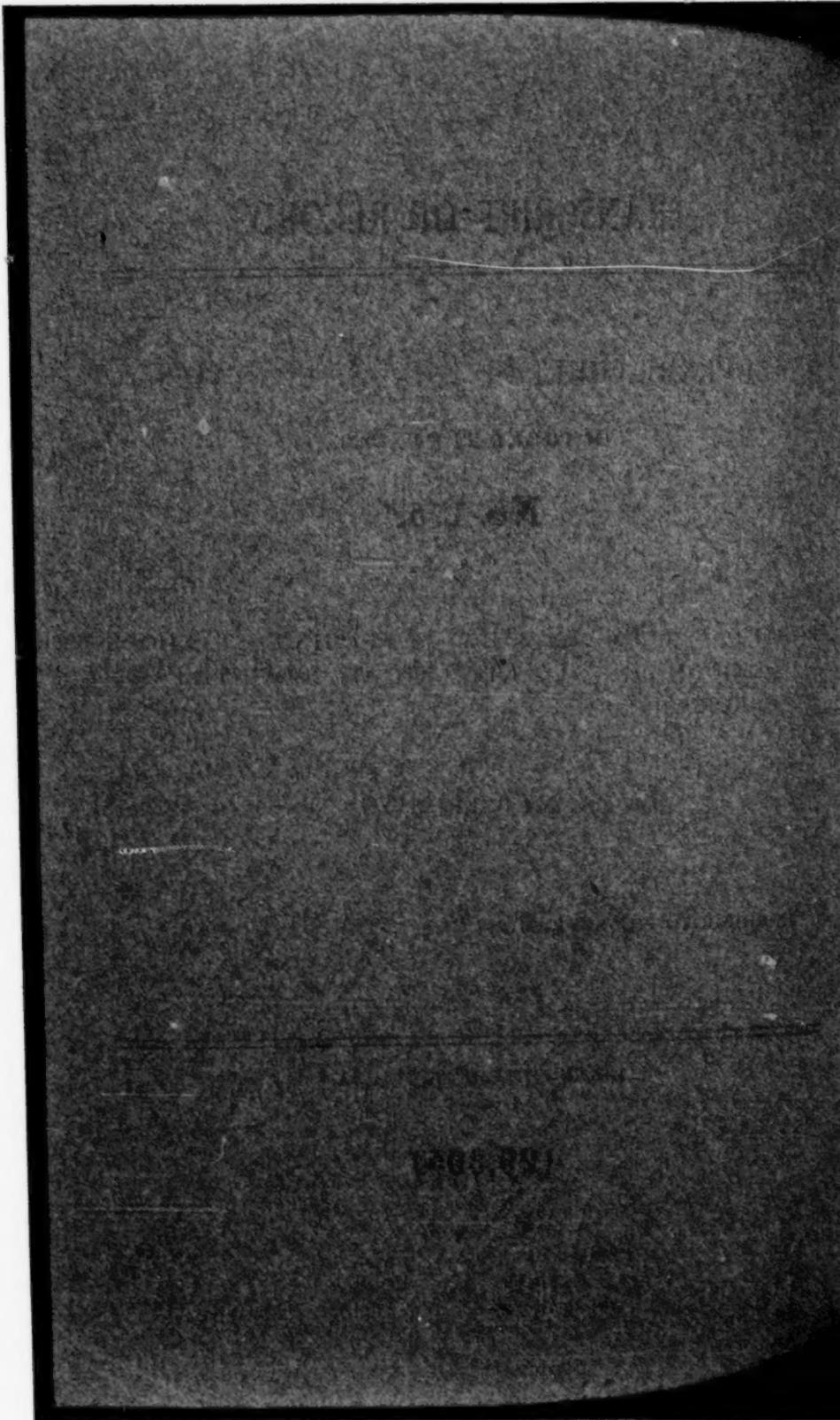
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 175.

**W. F. FLEMING, JOHN A. FLEMING, STEPHEN
FLEMING ET AL, ETC, ET AL., PLAINTIFFS IN
ERROR.**

ANNA B. FLEMING.



(29,305)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 175.

ROBERT J. FLEMING, JOHN A. FLEMING, STANHOPE
FLEMING, ET AL., ETC., ET AL., PLAINTIFFS IN
ERROR,

v/s.

ANNA B. FLEMING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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1 [File endorsement omitted.]

IN THE SUPREME COURT OF IOWA

In Equity.

ANNA B. FLEMING, Plaintiff, Appellee and Defendant in Error,
vs.

ROBERT J. FLEMING, JOHN A. FLEMING, STANHOPE FLEMING,
Fleming Bros., a Partnership, and John A. Fleming, Administrator of the Estate of Charles Fleming, Deceased, Defendants, Appellants and Petitioners in Error.

STIPULATION

[Filed Dec. 16, 1922.]

It is hereby stipulated and agreed by and between the parties to the above entitled cause:

1. That the record in said cause which shall be submitted to the Supreme Court of the United States, and upon which said court is to decide the cause, is the record which shall be certified by the Clerk of the Supreme Court of Iowa to be such record.

For the purpose of simplifying and reducing the volume of the record and making review by the Supreme Court of the United States easier by means of eliminating all matters that are immaterial and of no aid to such review, it is further stipulated that said record to be so certified, submitted and acted upon by the court, shall and is hereby made to consist of the following words, figures and matters, to-wit:

2. It is further so stipulated and agreed that these appellants now petitioners perfected their appeal from the decree of the District Court of Iowa in proper manner and in due time.

3. It is agreed and stipulated that this cause shall be presented to the Supreme Court of the United States upon the record as herein stipulated, unless said court shall order the amendment, enlargement or reduction thereof.

Dated this 14th day of December, A. D., 1922.

Albert B. Cummins, Clinton L. Nourse,
William E. Miller, Attorney for said
Defendants, Appellants and Petitioners
in Error. Parsons & Mills, Attorneys
for said Plaintiff, Appellee and Defendant in Error.

3 & 4 In the Supreme Court of Iowa, May Term, A. D. 1918.

[Title omitted.]

Appeal from Polk District Court.

Hon. Charles A. Dudley, Judge.

William E. Miller, with whom is Albert B. Cummins, Attorneys for Appellants.

Parsons & Mills, Attorneys for Appellee.

APPELLANTS' ABSTRACT OF RECORD

[Filed March 2, 1918.]

5 On July 5, A. D. 1916, the plaintiff filed in the office of the clerk of the District Court of Polk County, Iowa, the following:

PETITION IN EQUITY

Comes now the plaintiff, and for her cause of action states:

1. That on the 2nd day of Jan., 1881, she was married to Charles Fleming, who is now deceased, having died in Polk County, Iowa, on the 15th day of January, 1916, leaving no last will and testament, and no issue, and leaving surviving him the plaintiff herein, his widow, and three brothers, Stanhope Fleming, Robert J. Fleming and John A. Fleming.

2. The defendants herein, the widow, and each of these brothers being residents of Des Moines, Polk County, Iowa.

3. That at the solicitation of said brothers of plaintiff's deceased husband, the plaintiff herein joined in a petition that said John A. Fleming be made administrator of the estate of plaintiff's deceased husband.

4. That the plaintiff herein then learned for the first time that the brothers of her deceased husband claimed to own all of the property of her deceased husband save and except the exempt household goods of an estimated value of Five Hundred Dollars, though in fact, the value of the same is considerable less.

5. That plaintiff's deceased husband and his aforesaid brothers had for all of their business lives been associated together in business, as a partnership, in all of their business transactions, and that they owned all of their property in equal proportions; and that plaintiff's deceased husband died seized of an undivided one-sixth interest of all of the partnership property, subject only to a proportionate share of the partnership debts.

6. That plaintiff's deceased husband carried life insurance in the amount of Fifty-eight Thousand Dollars.

7. That the Fleming Brothers owned a Corporation, known as "The Fleming Brothers, Incorporated," in which the stock was

equally divided among the four brothers, Twenty-five Hundred shares to each, and that among the partnership property, a fourth of which was owned by plaintiff's deceased husband, was a certificate of Twenty-five Hundred Shares of Stock in the Fleming Brothers, Incorporated, in the name of Chas. Fleming; and that said incorporation was effected in the year 1901.

8. That there stood also, in plaintiff's deceased husband's name at the time of his death certain real estate, which is now claimed to be owned by the three surviving brothers, the defendants in this action.

9. That the Fleming Building in the city of Des Moines and other real estate is a part of the assets of Fleming Brothers, Incorporated, the interest of plaintiff's deceased husband in said property, being evidenced by his certificate of stock in Fleming Brothers, Incorporated, in the amount of Twenty-five Hundred Shares.

10. Plaintiff further alleges that the three brothers of her deceased husband, who are named as defendants herein, claim that said stock is theirs, and have turned in and had cancelled each certificate of Twenty-five Hundred Shares and have turned in and marked cancelled the certificate of Twenty-five Hundred Shares, which this plain-

7 tiff alleges was the property of her deceased husband and have had re-issued to themselves the Ten Thousand Shares in certificates of one-third of Ten Thousand Shares to each of them.

11. That said three brothers of plaintiff's deceased husband, named as defendant herein have collected the Fifty-eight Thousand Dollars life insurance upon the life of plaintiff's deceased husband and have converted the same to their own use.

12. That the defendant, John A. Fleming, Administrator of the estate of plaintiff's deceased husband, Charles Fleming, filed in the probate division of this court, a statement claiming that he and his said two brothers, to wit, Stanhope and Robert, were the owners of all of the property of Charles Fleming, deceased, save and except the exempt household goods composed of: Four Bed Room Suites, Five Book Cases, Three Hundred Volumes private Library, Household Furniture for dining room, living room and porches, etc., one Weber piano, One Edison Phonograph, One Watch, Dishes, Cooking Utensils, Kitchen Furniture, which the administrator estimated to be of the value of Five Hundred Dollars, though the same has not been appraised, and in said inventory or statement, set aside this property for the use and benefit of the wife of Charles Fleming, deceased; but claims that all of the balance of the property of Charles Fleming, deceased, the deceased husband of plaintiff, belongs to himself and said two brothers, and claims that the said property belongs to them, i. e., Robert J. Fleming, John A. Fleming and Stanhope Fleming, on account of three certain written agreements entered into; one on the 14th day of December, A. D. 1896; the next one on the 23rd day of January, A. D. 1897; and the third and last one, on the 17th day of January, A. D. 1911; said first contract being in words and figures as follows:

EXHIBIT 101 TO PETITION

(Identified in Evidence as Exhibit 101)

"Know all men by these presents that we Robert J. Fleming, Charles Fleming, John A. Fleming, and Stanhope Fleming, of the city of Des Moines, State of Iowa, in order to provide for the future uninterrupted prosecution of the business of Life Insurance in which we are now or may be hereafter engaged and mutually associated, and to fix and determine the interests of each therein, hereby mutually agree, and bind ourselves, our heirs, executors, administrators or survivors and all other persons, that, each of the parties to this stipulation and agreement, shall have only such share of, and interest in the profits, earnings and income of the business of Life Insurance in which we are or shall be jointly engaged, as shall be actually received by each or paid upon the order of each, with the consent of the others, from the income of said business. And such amount so paid shall fully represent the share and interest of each of the parties hereto, at any time while we the undersigned shall be associated together in said business or thereafter. Upon the death or withdrawal of any party hereto, all his interest in said business shall thereupon cease and determine and at no time shall any accounting be made or required to be made by any party hereto, his representatives, executors, heirs or survivors, or any other person claiming under him, or to any person officer or representative, upon any basis of labor performed or money received on account of said business by any of the parties hereto or otherwise. And it is distinctly understood and agreed between the parties hereto that they, nor any of them have, or can have any property rights, or money interests in said business other than that herein specified and defined, and

9 any sum of money paid to or for any party hereto shall be in full of the interest of said party in said business.

Signed this 14th day of December, A. D. 1896.

Robert J. Fleming. Charles Fleming.
 John A. Fleming. Stanhope Fleming.
 In presence of Geo. B. Frye, Witness."

Said second contract being in words and figures as follows:

EXHIBIT 102 TO PETITION

(Identified in Evidence as Exhibit 102)

"Know all men by these presents: that we, Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming of the city of Des Moines, Iowa, in view of our past association in, and the manner of the conduct of our business without the usual and ordinary incidents of a partnership, and to more effectually define and determine our individual interests in said business in the future, as

between ourselves and in relation to all other persons, and to provide for the future uninterrupted prosecution of said business in which we are now engaged, or may be hereafter associated, hereby mutually agree and bind ourselves, our heirs, executors, administrators, survivors, and all other persons as follows: That in consideration of the services of each of us rendered, or hereafter to be rendered in the business of life insurance, of the income to be derived therefrom and of the mutual stipulations herein contained, each of the parties to this agreement has, and hereafter shall have, only such share of, and interest in the profits, earnings, renewals due or to become due under any and all contracts of insurance, or commissions thereon, to whomsoever nominally payable in the business of life insurance in which we are now or any of us shall hereafter be jointly engaged, as shall be actually received by each, or shall be paid upon the order of each with the consent of the others, from the general funds or income of said business; and any sum or amount so paid shall 10 fully represent the share and interest of each of the parties hereto at any time while any of the undersigned shall be associated together in said business or thereafter. It is further agreed that upon the death or withdrawal of any party hereto, all his interest in said business, and in the assets thereof, shall thereupon cease and determine; and at no time shall any accounting be made, or required to any person, or any party hereto, or their heirs, executors, administrators, survivors or representatives. It is further stipulated and agreed that any and all contract rights, and all interest in renewals of policies of insurance in the Mutual Life Insurance Company of New York, due or to become due since January 1893, all commissions earned or hereafter to be earned, and all bonuses, allowed, payable or to become payable in any manner, whether payable to or standing in the name of Robert J. Fleming or any other of the parties to this agreement, are hereby assigned and transferred to, for the mutual benefit of the parties hereto, to be used, applied and disposed of in the manner only as herein agreed and provided for. It being the intention of all the parties to this agreement, and they hereby declare that they, nor any of them have, or can have any property rights or money interest in said business other than that herein specified and defined, so long as any of them shall be associated together in the business of life insurance.

Witness our hands this twenty-third day of January A. D. 1897.

Robert J. Fleming. Charles Fleming.

John A. Fleming. Stanhope Fleming.

Witness as to signatures of Robert J.,
Charles, John A., and Stanhope Fleming.
A. W. Brown."

The third contract being in words and figures as follows:

11

EXHIBIT No. 103 TO PETITION

(Identified in Evidence as Exhibit 103)

"Whereas, the undersigned, Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming, are engaged in the life insurance business in the States of Iowa, Nebraska and Wyoming under a contract with the Massachusetts Mutual Life Insurance Company; and,

Whereas, each of the undersigned is the owner of one-fourth of the stock of a corporation organized under the laws of the State of Iowa known as Fleming Brothers, Incorporated; and,

Whereas, the undersigned also are the owners of certain real estate and other property in which each of them is interested; and,

Whereas, the undersigned expect to acquire additional property hereafter; and,

Whereas, the said property now held and owned by the undersigned has been acquired by them with the understanding that it shall be disposed of as hereinafter set out;

Now, therefore, in consideration of the premises and one dollar in hand paid by each of the undersigned to each of the other whose names are signed hereto;

This agreement made and entered into by and between the said Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming on this 17th day of January, A. D. 1911, will witness:

1st. That the partnership between the undersigned is with the express and distinct understanding and agreement that all of the property heretofore acquired by the undersigned has been acquired as the results of the said partnership, and that said property now belongs to the said partnership, including all proceeds of said insurance business with the renewals to which the parties hereto may be entitled thereon.

2nd. That upon the death of either one of the undersigned, the property then owned by the said partnership, including all property standing in the names of the individual partners which 12 embraces said stock in Fleming Brothers, Incorporated, shall be and become the property of the surviving brothers of the said partnership; and that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein, and the sole and entire interest of his estate therein.

The premiums upon all insurance carried by the undersigned, whether life or accident, (except policy #741051 in the Mutual Life Insurance Company of New York, upon the life of Robert J. Fleming, payable to Emma D. Fleming, his wife, which policy is not a part of the said partnership property) have been paid by the said partnership, and the said partnership is entitled to the proceeds of all such insurance except the policy above referred to payable to Emma D. Fleming.

3rd. This contract covers not only the property now owned, but also property hereafter acquired, and all hereafter acquired property, including the proceeds of life insurance, whether standing in the name of the said individuals, or either of them, or in the firm name, is understood to be firm property, unless there be an express agreement to the contrary.

Executed in quadruplicate.

Robert J. Fleming. John A. Fleming.
 Charles Fleming. Stanhope Fleming.
 Witness as to signatures of Robert J.,
 Charles, John A. and Stanhope Fleming.
 Katherine D. Ives.

13. The plaintiff further alleges that said three contracts are null and void insofar as they affect her rights as the surviving widow of Charles Fleming, deceased. That said contracts are null and void for the reason that they are without consideration and contrary to public policy. That they are further null and void, because they operate as a fraud upon this plaintiff and her rights as the widow of the deceased.

14. Plaintiff further alleges and claims that she is entitled to the distributive share of the property of her deceased husband Charles Fleming, in accordance with the provisions of the statutes of Iowa. Plaintiff alleges that there being no issue she, as the surviving widow, is entitled to Seventy-five Hundred Dollars, and one-half of the remainder of plaintiff's deceased husband's estate; and that she is entitled in addition thereto to a reasonable amount for her support for the period of one year from the death of her said husband.

15. Plaintiff further alleges that her husband died seized of an undivided one-fourth interest in all of the property of the Fleming Brothers, as a partnership, which partnership property includes all of the capital stock and property of Fleming Brothers, Incorporated, and also Fifty-eight Thousand Dollars of life insurance, and real property standing in the name of her deceased husband; all of which is claimed by the three brothers of Charles Fleming, deceased.

16. Plaintiff further alleges that said contracts herein set out, are testamentary in character and purport to do or to accomplish in themselves what cannot be accomplished by will, under the statutes of the State of Iowa, and are of no binding force or effect upon this plaintiff; and as a transfer of property are without consideration and colorable only; not in good faith, and for purpose of defeating plaintiff's rights as widow; that they were concealed from her and not made known to her until after the death of her husband; and that during all the years of her married life, she has never been advised of any arrangements such as is outlined in said contracts;

14 and that she performed her duties as wife during all of said time and assisted in accumulating, by so doing, the property of which her husband died seized.

17. That this plaintiff is not advised as to the extent of the property of the Fleming Brothers, as a partnership, or of the property

of the Fleming Brothers, Incorporated, nor as to the actual extent of real estate standing in her husband's name except that described in inventory of Charles Fleming's Estate at the time of his death, further than is stated in this petition.

Wherefore, plaintiff prays that the court enter a decree in this matter construing said contracts herein set out to have no binding force or effect upon this plaintiff, and decreeing that as to this plaintiff that Charles Fleming died intestate; and that this court further decree that all of the property now held by the defendants including all the assets of Fleming Brothers, Incorporated, represented by the corporate stock, which is a part of the property of said defendant partnership be held insofar as the interest of this plaintiff is concerned, in trust for her; and that the amount of her interest under the statutes of the State of Iowa, as the surviving widow of Charles Fleming, deceased, be fixed and determined by this court and be impressed in that amount upon said property in the hands of the defendants; and that in addition to her distributive share under the statutes of Iowa, she be decreed a proper amount for her support during the first year immediately following the death of Charles Fleming; and that she be decreed such other, further and different equitable relief as to the court may seem just in the premises, and for her costs in this action incurred.

(Duly verified.)

15 Thereafter, on the 11th day of September, 1916, the defendants filed in the said court and cause the following:

ANSWER

Come now the defendants, Robert J. Fleming, John A. Fleming and Stanhope Fleming, individually and as surviving joint tenants of the concern known as and doing business as Fleming Bros., and John A. Fleming as administrator of the estate of Charles Fleming, deceased, and for answer to the plaintiff's petition filed herein July 5, 1916, respectfully show to the court:

Paragraph 1. The defendants deny each and every allegation contained in the plaintiff's petition except such as are hereinafter specifically referred to and specifically admitted.

Par. 2. The defendants admit the allegations of paragraphs 1 and 2 of the plaintiff's petition.

Par. 3. The defendants admit that the plaintiff joined in petitioning for the appointment of John A. Fleming as administrator of the estate of Charles Fleming, deceased, but in all other respects deny the allegations of paragraph 3 of the plaintiff's petition.

Par. 4. Answering paragraph 4 of the plaintiff's petition, these defendants admit that they claim to own jointly and aver that they do own jointly as surviving joint tenants, all of the property in which their deceased brother, Charles Fleming, had an interest during his lifetime, his household effects alone excepted. They admit that the

said joint estate in which their deceased brother, Charles Fleming, was interested in his lifetime did not and does not include the household effects of which their said deceased brother was possessed.

16 That as to when the plaintiff learned for the first time of the nature, character, and extent of the interest of these defendants in the property referred to in paragraph 4 of the plaintiff's petition, these defendants have neither knowledge nor information sufficient to form a belief.

Par. 5. Answering paragraph 5 of the plaintiff's petition, these defendants expressly deny that they together with Charles Fleming in his lifetime, were associated in business as a partnership, and expressly deny that they owned all of their property in equal proportions, and expressly deny that their brother, Charles Fleming, died seized of an undivided one-fourth interest in any property or in any partnership property or in any property owned by Fleming Bros., and deny each and every allegation of said paragraph 5 of the plaintiff's petition.

Par. 6. Answering paragraphs 6 and 11 of the plaintiff's petition in relation to insurance upon the life of their deceased brother, Charles Fleming, these defendants deny the allegations of said paragraphs of plaintiff's petition and in relation to said life insurance aver the facts to be that Fleming Bros., a joint tenancy composed of Robert J. Fleming, John A. Fleming, Stanhope Fleming, and Charles Fleming during the lifetime of the latter, at the joint expense of said joint tenants carried a considerable amount of life insurance upon the life of each of the said four joint tenants and that each and every policy of insurance upon the life of each and every of the said four joint tenants was payable to the other members of said joint tenancy or the survivors of them, save and except policy No. 741,051, issued by the Mutual Life Insurance Company of New

17 York upon the life of Robert J. Fleming payable to Emma D. Fleming, his wife, which policy is not a part of the joint property of Fleming Bros.; the same being the policy referred to in the contract of January 17, 1911, referred to in plaintiff's petition.

That Fleming Bros., as such joint tenants, carried and collected life insurance to the gross amount of \$55,482.26 upon the life of Charles Fleming under policies each and every of which were payable to Robert J. Fleming, John A. Fleming, and Stanhope Fleming, or to the survivor of them. That of the said amount of life insurance upon the life of Charles Fleming, \$18,474.87 was deducted therefrom and applied by the insurance company issuing said policies in payment of loans which had theretofore been obtained and which were outstanding upon said policies, and that the balance of \$37,007.39 of the proceeds of said policies upon the life of Charles Fleming was by the beneficiaries paid to the Mutual Life Insurance Company of New York on loans made by said company upon policies upon the lives of these defendants. That all of the policies upon the life of Charles Fleming were policies issued by the Mutual Life Insurance Company of New York. These defendants deny that their brother, Charles Fleming, as an individual, carried any life

insurance, and deny that there was any insurance upon his life, other than that hereinbefore referred to payable as aforesaid.

Par. 7. Answering paragraph 7 of the plaintiff's petition, these defendants admit that jointly with their deceased brother, they formed a corporation at about the time stated in plaintiff's petition known as "Fleming Brothers, Incorporated." They deny that the stock in said corporation was equally divided as alleged in plaintiff's petition, and deny that it was in any wise divided except 18 nominally in the manner hereinafter set forth, and these defendants aver that about the year 1913, pursuant to the contracts referred to in the plaintiff's petition, certificates aggregating twenty-five hundred (2,500) shares were issued by said corporation in the name of each of the four brothers, joint owners and tenants as aforesaid. That upon the issuance of said certificates each of the four brothers, Charles Fleming included, forthwith endorsed in blank the certificate or certificates issued in the name of each, and each of the four brothers as joint tenants thereupon forthwith deposited all of the certificates, pursuant to said contract, in a common receptacle in their offices to which each and all of the four brothers, as such joint tenants, had access at all times. That in truth and in fact the entire stock of Fleming Brothers, Incorporated, was at all times and now is owned jointly by Fleming Bros., as joint tenants and by the survivors or survivor of them in the case of the death of any of the joint tenants. These defendants expressly deny that there was ever at any time any division of the stock of Fleming Brothers, Incorporated, among Robert J. Fleming, John A. Fleming, Charles Fleming, and Stanhope Fleming, but aver that Fleming Brothers, Incorporated is now and at all times has been owned as a joint tenancy by the joint tenants aforesaid and the survivor of them, and these defendants admit the allegations of paragraph 10 of the plaintiff's petition except in so far as the same are qualified by this paragraph of their answer.

Par. 8. Answering paragraph 8 of the plaintiff's petition, these defendants aver that any and all real estate which at the time of his death stood in the name of Charles Fleming was at all times and is 19 the property of Fleming Bros., with the incident of survivorship as between them; that all such property was acquired with joint funds and held for the joint benefit of said joint tenants and the survivors or survivor of them. That by reason of the fact that the only interest Charles Fleming, deceased, ever had in said real estate was that of a joint tenant, said Charles Fleming did not die seized of any estate in real estate and the plaintiff is not and never was seized of, possessed of, or entitled to any dower interest or distributive share in any real estate by reason of her relationship to Charles Fleming.

Par. 9. Answering paragraph 12 of the plaintiff's petition, these defendants admit the allegations thereof except as qualified or explained by the allegations of this answer; they admit that said paragraph 12 contains substantially correct copies of the three certain contracts therein referred to and these defendants aver that under and by virtue of the said contracts in said paragraph referred

to, these defendants as surviving brothers and joint tenants of Charles Fleming, deceased, are the absolute owners of all of the property of every name and nature of which Charles Fleming was possessed or to which he had title in his lifetime, save and except such exempt personal property as has been set aside to the plaintiff, and these defendants aver that the said contracts are valid and binding in all respects upon the plaintiff and are binding upon and inure to the benefit of these defendants as the surviving joint tenants of their late brother, Charles Fleming, deceased.

Par. 10. Answering paragraphs 14, 15, 16, and 17 of the plaintiff's petition, these defendants expressly admit that the plaintiff (as she alleges in paragraph 16 of her petition), performed her duties as wife of their deceased brother throughout his married life. But these defendants expressly deny each and every other allegation thereof and especially deny that the existence of the three contracts referred to in the plaintiff's petition was concealed from her but aver the fact to be that during all of the period of his business life and during all of the period of the existence of the marriage relation between the plaintiff and Charles Fleming, deceased, the said Charles Fleming did business jointly as a joint owner, joint worker, and joint tenant with his said three brothers, and not otherwise. That during all of said period neither the said Charles Fleming, nor any other member of said joint tenancy conducted any business or acquired any property individually except some household effects, wearing apparel, pin money, and the like. That during the entire business life and career of Charles Fleming, and during the entire period of his marriage relation with the plaintiff, all of the affairs of himself and his three brothers, these defendants, has been conducted jointly, and his personal and household expenses, including the personal expenses and pin money of the plaintiff, were paid out on checks issued and signed by Fleming Bros. That during all of the said period each and every member of the Fleming Family including the plaintiff, has received all personal funds, all maintenance, and all pin money, from Fleming Bros. That the plaintiff has at all times been regarded and is now regarded and at all times in the future will continue so to be regarded by these defendants as a member of the Fleming Family, and as such these defendants hope to continue to do in the future as they have at all times done in the past, and as they do now, namely, to supply the plaintiff as a member of the Fleming Family with every necessity, comfort, and luxury enjoyed by the Fleming Family and the several members thereof. But these defendants expressly deny that their brother, Charles Fleming, died seized or possessed of any estate in any property whatsoever, except household effects, and expressly deny that their said brother, Charles Fleming, either during his lifetime or at his death, either owned or was possessed of, or entitled to any estate of inheritance or any estate in which the plaintiff was, is, or could be entitled to a dower or distributive share or interest of any sort.

Wherefore, these defendants pray that the plaintiff's petition be dismissed and that judgment be rendered against the plaintiff for the costs of this proceeding.

(Duly verified.)

Thereafter, on September 22, 1916, the plaintiff filed in said court and cause the following.

REPLY

Comes now the plaintiff and for reply to the answer of defendants filed herein,

22 & 23 For reply to paragraph ten of defendants' answer this plaintiff denies that Fleming Brothers, or any other person than her husband provided her with household effects, wearing apparel, pin money or anything else necessary for her support. That the checks for her allowance, and for the money used were signed by Fleming Brothers, of which her husband Charles Fleming was one of the four, constituting said Fleming Brothers, which this plaintiff always believed and now believes was a partnership in which her deceased husband, Charles Fleming contributed as much time, energy and ability as any one of the four; that she never understood then, or does she understand now, that she and her husband were objects of charity or that they were being sup-

24 ported by Fleming Brothers, but this plaintiff alleges the fact to be that during the thirty-five years of her married life with Charles Fleming, that he earned a living for her and supported her well and accumulated by lifetime work and energy his one-fourth interest in Fleming Brothers and that she as his wife did her part, was economical and worked hard and faithfully.

Defendants allege:

"That the plaintiff has at all times been regarded and is now regarded and at all times in the future will continue so to be regarded by these defendants as a member of the Fleming Family, and as such these defendants hope to continue to do in the future as they have at all times done in the past, and as they do now, namely, to supply the plaintiff as a member of the Fleming Family with every necessity, comfort and luxury enjoyed by the Fleming Family and the several members thereof."

Plaintiff denies that she has in the past or never has been supported by any of the defendants in this cause of action, or that she is indebted to them in any sum or in any manner for the furnishing of necessities, comforts or luxuries; that all that she has had during the thirty-five years of her married life were furnished by her deceased husband, Charles Fleming, and that she is in no way dependent upon the defendants for any of such support; and further alleges that when she was first advised by Stanhope and John Fleming that she had no interest in the estate, save and except about three hundred dollars worth of household goods, that this plaintiff at that time inquired concerning her allowance and was informed

25 by John Fleming that the allowance her husband had given her heretofore was a good deal of money and that she could get along with less, said allowance having been Forty-five Dollars per week, for the purpose of maintaining herself and her home. Later, the defendant, Robert Fleming, informed her that if they supported her, she would have to go to live with, and keep house for John Fleming, and that they would give her such allowance as they saw fit. Plaintiff asked if she was to have a writing to the effect that she would have her allowance, and the defendant, Robert Fleming told her that she would have to take his word for that, and she would never get any writing out of them. Whereupon plaintiff refused to assent to the arrangements they saw fit to make.

Plaintiff further alleges that her allowance of Forty-five Dollars per week has been continued, but alleges that the same is part and portion of that portion of her husband's estate, which by law belongs to her, and is not a donation, nor a charitable contribution from Fleming Brothers.

Wherefore, plaintiff prays as in her original petition and asks in addition thereto that the pretended writing, bearing her signature, purporting to be a deed, releasing any of her rights in any of the property of her deceased husband, Charles Fleming be decreed to be null and void on account of fraud and duress and lack of consideration.

(Duly verified.)

Thereafter, on the 11th day of December, 1916, at a regular term of the said court the said cause came on for hearing in equity before the Honorable Charles A. Dudley, one of the judges of said court, and the following proceedings were had.

26

PLAINTIFF'S EVIDENCE.

Mrs. ANNA B. FLEMING, the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Earl C. Mills:

I am the plaintiff in this action and the widow of Charles Fleming. We were married January 2, 1880, at Williamston, Michigan. My husband died January 15, 1916.

My husband had three brothers, Robert, John and Stanhope Fleming, living at the time of his death. A sister, Jennie, and his father and mother had predeceased him.

We lived in the town of Marshall, Minnesota. When we first went there, Charles Fleming had these old horses and some old wagons that was spoken of (in the opening statements) that he took care of and sold, and then afterwards he came down to Dubuque at

different times and with his brothers they bought up carloads of horses and he brought them back and we kept a stock barn and he sold those horses and we had this piece of property there, 27 & 28 forty acres of ground, and we raised crops on it. Fleming Bros. were supposed to own that forty acres. There was no house on it. It was cultivated.

When my husband and I came to Des Moines he went into the insurance work with his brothers, Robert, John and Stanhope. He continued in that business until the time of his death.

29 All three said they had never saw or found any will of Charlie's. I said that seemed very strange that he would not have a will or something stated in writing or something like that, that I could know something about, and then Mr. Rob Fleming said, "Why there is. We have a contract," he says, "that is just the same as a will or a deed." Prior to that moment I had never in my life heard of any such contract. That was my first knowledge of the kind. That was April 11. During the week between April 4 and April 11 they had told me that I did not have any interest. I never heard of these contracts until April 11.

Speaking of that contract, Robert said, "We have a contract and," he said, "you know about that." I said, "No, Rob, I never heard of the contract." He said, "Well, that is just the same as a will," he said, "or a deed. You could not break it any easier than you could a will. And," he said, "Hope, you get the contract and let her read it." Hope went and got the contract to let me read it and while I was trying to he held it in his hands for quite a long time and explained that this contract was the same as a will or a deed and went on to tell how they had had this for some time and he asked me then if I hadn't known anything about it. I said, "I never heard of it." I said, "This is my first knowledge of anything of this kind." And then Rob told him to hand it over to me to read and they all three began talking to me so much that I didn't get any sense of the reading at all. Before I could get across one 30 & 31 line one would be asking me something, and then the other, and I had no knowledge when I got through of what was in it. This is the first time that I had any actual knowledge of the existence of the contract.

32 Q. Now, Mrs. Fleming, what of your husband's estate was set aside to you by the administrator, John Fleming, if you know?

A. I don't know as any, excepting my household goods.

33 That is all I have had any knowledge of.

Since my husband's death they have sent me the allowance of \$45 a week up to date. They said that they thought it was too much.

At the time I signed these papers on the 11th of April and at the other time, I did not intend to waive any of my rights in my deceased husband's estate, and I did not understand that I was waiving any rights in his estate.

Cross-examination.

By Mr. W. E. Miller:

My petition alleges that Charles Fleming and I were married January 2, 1881. My testimony on direct examination that we were married January 2, 1880 is correct. At that time I was twenty years of age. My husband was twenty past. He was born July 4, 1860 and I was born November 3, 1860. I am fifty-six years old the third of November. My husband, Charles Fleming, died without children surviving him. We had one child which died in infancy. He was born November 22, 1882 and died January 26, following.

When we were first married we lived for several months,—two or three months,—in the Fleming home at Williamston. The household there consisted of Mother Fleming, Jennie Fleming,
34 Robert Fleming, John Fleming, and Stanhope Fleming.

Charles and myself were there a couple of months. John and Stanhope were single. Robert had been married a couple of years before but his wife had died the 26th of January, the month I was married. So, during the time I lived as a member of that household, Robert J. Fleming lost his wife.

At that time the four brothers were engaged in the milling business together. They had a sawmill they were working in. Their father was deceased and the brothers were carrying on the business.

Q. Mrs. Fleming, do you know anything about how they managed their finances at that time?

A. I did not. I never heard how they did.

Q. You don't know whether they had any method of sharing or dividing up or not?

A. No, sir, I never heard them mention it.

After staying with the family for a time, my husband and I took apartments over a store. We had our own little home for a long time and then we bought a little place on High Street and lived there until they had the failure in business which occurred about 1885. It was just a few weeks before Mr. Robert Fleming went up to Saint Paul.

Q. Now, during the time that you occupied these apartments, do you know anything about any change in their financial arrangements having occurred?

A. Not at all, excepting that they lost all that they had there. That was the only thing I knew.

35 The house that my husband and I bought was not paid for.

We were to pay so much each month. The business failure interfered with that project and we let it go.

So far as I know the financial arrangements of the four ~~brothers~~ between themselves continued unchanged.

My husband and John left about the same time and the three of them, Robert, John, and Charles, engaged in some railroading contract. During the time my husband was gone on that enterprise I

was part of the time with my parents and part of the time with Charlie's mother. They were engaged in that railroading enterprise a little over a year.

Q. Do you know anything about their financial arrangements as between themselves during that time?

A. No sir, I did not.

36 I did not receive much in the way of remittances. None of the family were receiving very much along about that time, but whatever there was was sent to their mother because she was the one that was keeping the home. When I stayed there with their mother, I never was at any expense.

When they had completed their work, my husband settled back into Marshall, Minnesota, and had these old horses and wagons left there for him to sell and take care of, and then his mother went to Dubuque to live and I went up there to Marshall, Minnesota, to be with my husband. During the time Robert, John, and Charles were in Minnesota on the railroad job, Stanhope was with his mother working around there. He went to Dubuque when she did and I went first to Dubuque and from there to Marshall. I stopped in Dubuque just a little time until the mother got settled, and then I went to Marshall, Minnesota with my husband. I only stopped at Dubuque a short time—a week or two.

We were in Marshall for something over five years.

These horses and wagons and things I spoke of and the lands we occupied and farmed up there all belonged to Fleming Bros.

Q. So far as you know, Mrs. Fleming, no one of the brothers acquired any individual interest in any of those lands in Minnesota?

A. I don't know anything about that part of it.

Q. I say, so far as you know?

A. Yes, sir, so far as I know.

Q. And furthermore, so far as you know, whatever they had up there in the way of lands or contracts for lands, or wagons or horses belonged to the brothers?

37 A. Belonged to the four of them, or was supposed to.

Q. Belonged to the four of them?

A. Yes, sir.

Q. That was your understanding at the time?

A. Yes, sir.

Q. And has been your understanding ever since?

A. Yes, sir.

My husband and I came down to Des Moines in 1893. The other three brothers were here at that time and their mother and sister came from Dubuque to Des Moines at that time.

Q. And what was the household arrangement then as to who composed the household when you moved here to Des Moines?

A. Why, there was Mother Fleming and Jennie and Robert Fleming, John Fleming, Stanhope Fleming, and Mrs. Anna Bulger.

Robert Fleming had not remarried at that time. My husband and I came here in the fall of 1893, and were for a time inmates of the same household,—members of the same household as the other members of the family. That arrangement continued during that winter, I believe.

Q. So far as you know the expenses of Charles Fleming and wife were handled by the brothers?

A. Why all the expenses were handled possibly that way.

My husband and I went to housekeeping in the spring of 1894 and have lived in Des Moines since that time except for that part of a year that Mrs. Fleming was sick they thought Charlie ought to go to Dubuque to be in the office there because he was traveling and was away from home most of the time, and the boys suggested 38 that he should go there and live where he could be in and out oftener than he was here, and we moved there and we was only there a short time when their mother took sick and they sent for me and I came back here and stayed in the family and helped them with their home duties and things. She died and was taken away and then John asked me to remain with Jennie for a short time which I did, and then Charlie moved our furniture back here to Des Moines and we stayed here from that time on. It was not more than eight or nine months that we were out of this city and in Dubuque. That was about 1897.

39 When we returned from Dubuque to Des Moines, my husband and I went to housekeeping on Sixth Avenue, north of Clark. We lived there until 1888 or 1890. It was rented property, and then we moved across the street into another rented property. I do not know of my own knowledge who paid the rentals or from what source they came. I don't remember how long we remained at the last mentioned place. We were there a long time and then we moved onto Woodland Avenue in the Shore flats, where we lived about a year. All these were rented properties. From the Shore flats we went to the Chamberlain house at 1820 Ingersoll Avenue and continued to reside there for about nine years until the death of my husband.

Q. Do you know of your own knowledge from what source the rents on the Chamberlain flats and on the Shore flats were paid?

A. Why, they were paid from the office.

Q. As a matter of fact they were paid, as you understood it, and as you understand it, by checks from Fleming Bros.?

A. Yes, sir, they were paid by Fleming Bros.

40 While my husband was engaged in business there in Dubuque,—it was in the life insurance business, Fleming Bros.—the agents for the Mutual Life Insurance Company of New York. Since I came to Des Moines in 1898, I obtained funds by going to the office and having a check that Mr. Fleming gave me. The checks were signed, "Fleming Bros." Sometimes the checks were signed by Rob, sometimes by John, and sometimes by my husband,

Charles. I never received a check for that purpose which was signed otherwise than "Fleming Bros."

Q. How was the "brothers" spelled?

A. B-r-o-t-h-e-r-s.

Q. Always spelled out?

A. Yes, sir.

Q. You are quite sure of that?

A. I am not going to be positive, but I think the checks could be brought forth and shown for evidence. I have one check in my purse now.

Q. You say you have got one. Let us take a look at it and see how it is signed?

A. All right.

(The witness produces a check dated December 9, 1916, payable to Mrs. Charles Fleming, \$45, drawn on the Citizens National Bank of Des Moines.)

Q. And how is that signed?

A. Fleming Bros. My husband always signed them that way too. He has signed many a check for me.

41 These checks which were handed to me were sometimes handed me by the bookkeeper, sometimes by Mr. John Fleming,—and most often by Mr. John Fleming since my husband's death. I have been receiving a weekly check from Fleming Bros. for \$45 for four or five years, probably. Since my husband's death I have received those checks regularly, \$45 a week. Prior to the time when they were turning over checks for \$45 a week, I received checks for smaller amounts. I have had money whenever I was in need of money, but I couldn't say the amount. But it did not come up to \$40 or \$20.

Q. Prior to this time when you began getting the \$45 checks, did you get regular weekly checks or regular monthly checks, or how?

A. Well, whenever I was in need of money, Mr. Fleming gave it to me.

Sometimes in money, sometimes in a check. I couldn't say how the checks were signed, but it must have been Fleming Bros., but I could not say, because I never gave any attention to that part of it.

Q. Did your husband ever hand you a check that was signed, "Charles Fleming"?

A. He has on my birthdays.

Q. On your birthdays? When did he do that, Mrs. Fleming? Now please be sure that you understand. I want to know if he ever handed you a check to which the single name, "Charles Fleming," was signed?

A. I would not positively say, because it is something I do not remember.

I do not know of my husband ever having had an individual bank account standing in his own name which he used for current purposes.

42 & 43 Q. During the time of your residence in Des Moines, both before and after your residence in Dubuque, do you know of any change having occurred in the business and financial relations of the four brothers?

A. I do not.

Q. So far as you are aware the same methods were pursued and arrangements had as had prevailed from the earliest relationship that you bore to the family?

A. Yes, sir.

Q. And continued to the time of the death of your husband?

A. Yes, sir.

Q. Mrs. Fleming, since the brothers engaged in this insurance business at Dubuque and Des Moines, has there ever been a single instance, down to the death of your husband, when you applied at the office either in Des Moines or Dubuque, for money that it was denied you?

A. No sir.

Since the time of my husband's death, I have received each week from Fleming Bros., a check for \$45.

I relinquished that house at 1820 Ingersoll avenue in September, 1916. I moved out in October, 1916. I never paid the rent on that house out of any moneys which I had received. I understood the house rent was paid from the office by Fleming Bros.

44 The defendants offer in evidence the petition for letters of administration in number 9562, Probate, Estate of Charles Fleming, as a part of this cross examination. Said petition is as follows:

PETITION FOR LETTERS OF ADMINISTRATION

To the said District Court of Polk County, Iowa:

Your petitioners, Anna B. Fleming, Stanhope Fleming, Robert J. Fleming, and John A. Fleming, respectfully show that Charles Fleming, late of said county, now deceased, died at Des Moines, in Polk county, Iowa, on or about the 15th day of January, 1916, leaving no last will and testament so far as known to and believed by these petitioners. That said deceased left surviving him Anna B. Fleming, as his widow, who resides at Des Moines, and also the following heirs at law, namely: Robert J. Fleming, brother, 59 years of age, of Des Moines, Iowa, John A. Fleming, brother, 53 years of age, of Des Moines, Iowa, and Stanhope Fleming, brother, 51 years of age, of Des Moines, Iowa, and all residents of Polk county, Iowa; that said deceased died seized of the following described real estate, namely:

The undivided one-half ($\frac{1}{2}$) of the south half (S. $\frac{1}{2}$) of the north-east quarter (N. E. $\frac{1}{4}$) of section eight (8), in township one hun-

dred eleven (111), of range forty-one (41), in Lyon county, Minnesota, and

A part of lot five (5) of the subdivision of the north half (N. 45 1/2) of the northeast quarter (N. E. 1/4) of section seven (7), township seventy-eight (78), range twenty-four (24) west of the Fifth P. M. Iowa, known as Pierce's Subdivision and now included in and forming a part of the city of Des Moines, Iowa, described as follows: Commencing at a point 200 feet west of the northeast corner of said lot 5, running thence south eighty rods, to the south line of said lot, thence west along the south line 65.32 feet, thence north 40 rods, thence west 165 feet, thence north 40 rods to the north line of said lot 5, thence east 230.32 feet to the place of beginning, and

Lots five and six in Block A, of Beck's Replat of Okoboji City, Dickinson county, Iowa.

all subject, however, to the terms of three (3) certain contracts dated respectively, December 14, A. D. 1896, January 23, A. D. 1897, and January 17, A. D. 1911, between the deceased and his brothers above named, and also personal property governed by the same contracts of about the value of 500.00 dollars, which may be lost, destroyed or diminished in value if speedy care be not taken of the same.

Your petitioners being respectively the surviving widow and heirs at law of said deceased, therefore pray that letters of administration may be granted unto John A. Fleming, on the estate of said Charles Fleming, deceased.

Anna B. Fleming. Robert J. Fleming. Stanhope Fleming. John A. Fleming.

STATE OF IOWA.

Polk County. ss:

Subscribed and sworn to by Anna B. Fleming, Robert J. 46 & 47 Fleming, Stanhope Fleming and John A. Fleming on this 11th day of April, 1916, before me the undersigned notary public in and for Polk county, Iowa.

A. G. Rippey, Notary Public in & for Polk County, Iowa. (Seal.)

48-50 I remember that some time in August, 1915, Dr. Babcock of Chicago came out to see my husband professionally and he also came again later on, probably in November. His services were paid by the check of Fleming Bros. The first trip \$500 and the second one \$100. From time to time my husband and myself had occasion to consult Dr. Priestly and the bills for those medical services were paid by the checks of Fleming Bros. I had two or three different sick spells. I had pneumonia in the fall of 1899 and was sick until along in the spring of 1900. These medical expenses were paid by the checks of Fleming Bros. but my husband stood at the foot of it.

Q. Do you know that it is a fact that those medical bills for yourself and husband were handled exactly the same as the medical bills

for every other member of the Fleming family? That is, paid off with the Fleming Bros.' checks?

A. Yes.

Q. The expense incident to the funerals of the mother and sister were paid, were they not, by the Fleming Bros.' check?

A. I know nothing about their checks.

Q. The expenses incident to your husband's funeral were paid for the same way?

A. I always considered it came from my own husband's work. He earned it.

Q. I am only asking you to answer one thing, and that is whether you know those bills were paid by Fleming Bros.' check?

A. I don't know, but I presume they were. I didn't see the checks.

Q. You never paid that out of your allowance of \$45?

A. No, sir, I never paid them from my allowance.

51 After the failure my husband did anything he could get to do. He worked out on the streets and our household bills were paid by my husband out of his meager earnings.

Q. In response to a question you stated that the property belonged to all of the brothers. Now, who did you mean, all four of the brothers?

A. All four of the brothers has been my understanding ever since I was in their family; whatever was earned belonged to the four in equal shares, and all their bills were paid and my husband was supposed to share his the same, and charged to him has been my understanding.

Q. Now in 1885 when there was nothing, when Charlie and the rest of them worked at anything they could get to do, did each one pay his own personal expenses?

A. As far as my knowledge.

Q. And it was after they went into the insurance, was it that they owned their property together?

A. That they accumulated the property together, as far as I have—

Q. Now you have said that the expenses were handled by the brothers. What did you mean by that?

A. Well, I supposed and have always believed and thought and as far as my knowledge went, that the expenses was divided equal. That is whatever expense that I was to or whatever money I took out was charged to my husband, and whatever the other families drew from the firm, or the amount of money or whatever they may call it, it was charged to each one of their—the head of their family.

Mr. Miller: I move to strike the statement of the witness as to what she believed and thought as being wholly immaterial, incompetent, and irrelevant.

52 & 53 Q. Now you observed that all of the bills that were met by check were met by the check of Fleming Bros.?

A. Yes, sir.

Q. And the understanding you have just spoken of is the understanding you had as to that?

A. All my married life.

Mr. Miller: I move to strike out her understanding as being incompetent.

A. It has been my knowledge as far as it could go.

54 & 55 Mr. Mills: Plaintiff offers in evidence the

INVENTORY

filed by John A. Fleming, administrator in the matter of the estate of Charles Fleming, deceased, same being No. 9562-31 Probate, as bearing upon the claim or claims made by the brothers as to their deceased brother's estate, and for no other purpose:

And now on this 26th day of April, 1916, comes John A. Fleming, administrator of said estate and says that the following pages contain a true and full inventory of all the personal estate of the deceased which has come into his hands, or of which he has any knowledge whatsoever.

The following is a list of the property considered as exempt and not liable to be sold to pay debts.

4 Bedroom suites

5 Bookcases

300 Volumes private library

Household furniture for dining room, living room, porches, etc.

56 1 Weber piano.

1 Edison phonograph.

1 Watch.

Dishes, cooking utensils, kitchen furniture.

All set aside to Anna B. Fleming, surviving widow, as exempt and as her property.

The following is all of the other personal property of deceased with which I am to be charged.

Cash on hand, None.

Cash on deposit in —, None.

See attached statement and copies of contracts.

Amounts Owing to the Estate on Open Accounts.

By Whom Owing, None; When due, —; Collectible or otherwise, —; Amount, none.

See attached statement and copies of contracts.

Amounts Owing to the Estate on Notes and Other Written Obligations.

From Whom, None; On What, —; When due collectible or otherwise, —; Amount, none.

See attached statement and copies of contracts.

Statement.

In his lifetime, Charles Fleming, deceased, was associated in business with his brothers, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, and originally the whole of the business of the four brothers was conducted as a joint tenancy in the nature of a co-partnership. This co-partnership was known as Fleming Bros. and continued to and including the death of Charles Fleming, and continues at the present time, the main interest and activity of the said joint tenancy or co-partnership being in the general agency for life insurance companies. *On* or about the month of April, 1901, a corporation was formed which is now known as Fleming Brothers, Incorporated, which corporation among other things, engaged in the erection, ownership, and operation of the Fleming Building in the city of Des Moines, Iowa, and owns other real estate. The entire stock of the corporation was issued to the four brothers, Robert J. Fleming, John A. Fleming, Charles Fleming, and Stanhope Fleming.

57 In all of the financial and domestic economies and enterprises, the said four brothers at all times throughout the period of their business activities, and throughout the active life of Charles Fleming, have acted as joint tenants, and have treated all property, funds, and enterprises as joint family or community interest for the benefit of the survivors or survivor of them.

That pursuant to their said business policy, the said four brothers did on or about the 14th day of December, 1896, make and enter into a certain contract in writing, a copy of which is hereto attached marked "Exhibit A," and made a part hereof.

That further pursuant to their said business policy the said four brothers did on or about the 23d day of January, A. D. 1897, make and enter into a certain contract in writing, a copy of which is hereto annexed, marked "Exhibit B," and made a part hereof.

That further in pursuance to their said business policy, the said four brothers did on or about the 17th day of January, A. D. 1911, make and enter into a certain contract in writing, copy of which is marked "Exhibit C," hereto annexed and made a part hereof.

That all of the property of every name and nature owned and acquired by each and all of the said four brothers, and all of the business and pecuniary interests of every name and nature of each and all of the said four brothers, has at all times been acquired, owned, held, operated, and conducted under, by virtue of, and pursuant to, the said three contracts. That Robert J. Fleming, John A. Fleming, and Stanhope Fleming, as the surviving brothers, heirs at law, and contracting parties, are advised that as such surviving con-

tracting parties, they are the joint owners of all of the property, rights, and interest of which the said Charles Fleming, deceased, was possessed during his lifetime, and at the time of his death, and the said Robert J. Fleming, John A. Fleming, and Stanhope Fleming, as such survivors, claim to be the absolute joint owners of all of said property of every name and nature as hereinbefore referred to in which Charles Fleming in his lifetime was inter-

ested, with the right of survivorship as between the said three surviving brothers.

That there was issued to Charles Fleming in his lifetime twenty-five hundred (2,500) shares of the stock of Fleming Brothers, Incorporated, and at the same time a like amount of the stock of said corporation was issued to each of his three brothers above named; that each of the said four brothers endorsed in blank the certificates issued to him, and all of the stock of said corporation so endorsed in blank was by each of the said four brothers deposited in a drawer in the safe in the office of Fleming Bros. and of Fleming Brothers, Incorporated, each of the said four brothers having access to said stock so deposited, and that the said twenty-five hundred shares of stock so issued to Charles Fleming *was* in said manner endorsed by him in blank and in said manner deposited by him in said safe. That said endorsement and depositing of all of the said stock was pursuant to the said contracts, exhibits A, B, and C, and said endorsements and deposits were made for the purpose of giving effect to the said contracts and for the purpose of effectually passing the title to all the said stock to the survivors or survivor of the said four brothers, and for the purpose of effectually passing the title in possession of said stock of Charles Fleming to the survivors or survivor among his said brothers. That pursuant to the said contracts and to the said assignment and delivery, the entire stock of Fleming Brothers, Incorporated, issued as aforesaid, has been turned in and cancelled and in lieu thereof there has been issued to Robert J. Fleming, John A.

59 Fleming, and Stanhope Fleming, jointly (not as tenants in common), and to the survivors or survivor of them, the entire authorized stock issue of the said corporation.

That by reason of the premises hereinbefore set forth, the undersigned, as administrator, is advised, and on the basis of such advice, reports to this court that there is no property of any name or nature, and there are no rights or interests of any sort belonging to the estate of Charles Fleming, deceased, save and except his exempt household effects hereinbefore scheduled, which have been set over to his surviving widow as hereinbefore reported.

That the business policy of the Fleming brothers, as such joint owners is such that any and all known personal indebtedness, including the funeral expenses of said Charles Fleming, has been paid and all proven claims against his estate will be paid by the survivors of said joint arrangement.

(Signed) John A. Fleming, Administrator
of the Estate of Charles Fleming, De-
ceased.

(NOTE.—Exhibits A, B, and C, referred to in the foregoing document, are the contracts in controversy and are set out in plaintiff's petition herein.)

STIPULATIONS.

Mr. Parsons: Viewing it that whatever was the legal status of Fleming Bros., it so far partook of a partnership nature that the right

to close the affairs of the partnership belonged to the survivors, and hence plaintiff in resting reserves the right to introduce testimony as to the value of the different items of the property of Fleming Bros., unless it be conceded that the cause may proceed to decree, and in the event decree should be for the plaintiff, then the matter of the valuation of the property of Fleming Bros. may be inquired into, in so far as may be necessary. My thought being this, that whatever we call this, whether we call it a partnership or whatever we call it it so far partakes of the nature of a partnership that the right of the surviving partners which the court remembers exists at law to close the affairs of the partnership, obviates any necessity of now going into the question of what was the actual valuation of that partnership. We have introduced some evidence to show that there was something for the court to consider here in the way of value, and we do not care to cumber the record unless the court should in the final end decree for the plaintiff. Then of course that would not come up, the question of settlement would not come up until after that decree was finally adjudicated.

Mr. Miller: Defendants are content that the plaintiff should rest her cause at *that* time, reserving the right to subsequently inquire further into the assets and liabilities of Fleming Bros., but of course do not wish to be understood as conceding that the relationship between the brothers was that of a partnership in the technical sense of the word.

Mr. Parsons: The only concession I asked of you was that in the event there was a decree for the plaintiff we might subsequently go into the question of the valuation of the items. That is all.

Mr. Miller: The defendants are content that that inquiry, if it ever becomes a subject of inquiry, may be reserved to a later time following the decision of the court as to the legal status of the brothers as between themselves.

Mr. Mills: The idea is that the plaintiff is not bound by exhibit A, which was introduced as the court understands, for the purpose—

The Court: I take it your first inquiry is, What is the legal status?

Mr. Miller: That is the way we look at it.

The Court: When we determine that, then if occasion presents itself for further inquiry into the details by way of setting it, if it should be adjudged to be a partnership, then you can inquire into it. I understand that is the concession.

Mr. Miller: That is the purpose we have.

60½ Mr. Mills: That is the purpose the plaintiff has.

The Court: With that reservation you may proceed.

Mr. Mills: With that reservation,

The plaintiff rests.

DEFENDANTS' EVIDENCE

Mr. Miller: Now, if the court please, in opening the testimony on behalf of the defendants, it seems to me to be necessary that the following statement should be made in the record. The defendants

Minnesota State Library

apprehend that the details of their handling of their personal finances and of the financial relations between them, so far as the items are concerned, are practically immaterial, and that the ultimate question to be determined by the court and the ultimate question which is of interest to the court is simply the question as to how the financial relations were regulated, regarded, and treated as between the four brothers. Therefore the defendants deem it unnecessary to encumber the record in this case with the books of original entry and with the evidences of original entry, of the items that were charged here and there in the personal accounts of Fleming Bros. and of the individual brothers. All of the books of account, including the books of original entry, are here in the court room, accessible and subject to the examination of the plaintiff and of the defendants, and it is proposed by the defendants to offer in evidence certain summaries or statements taken from the books, largely for the purpose of illustrating to the court the method of bookkeeping and of accounting as between the four brothers, Robert, John, Charles, and Stanhope, and the defendants expect to offer these summaries after identifying them properly, understanding that this method of proof will be acceptable to counsel for the plaintiff.

Mr. Mills: That is true, reserving the right to go into any of the books for the purpose of checking the summaries. No objection to that sort of an offer.

Mr. Miller: I may further say for the sake of the record and the enlightenment of the court that the defendants have caused subpoenas to be served upon something more than a half a dozen of witnesses who from time to time acted as bookkeepers for Fleming Bros.

and that those witnesses are persons who made original entries
62 and did the posting in keeping the books of Fleming Bros., but that in view of the foregoing statement and of the concession of counsel for the plaintiff, it is not now proposed to call those witnesses to the stand, but defendants propose to call to the stand Miss A. E. End, the present bookkeeper of Fleming Bros., and to identify so far as may be necessary all books of account by her.

Mr. Parsons: That is agreeable, but of course if we want to ask Miss End anything about it she will point it out to us, and that is all we care for.

Miss ADDIE E. END, being sworn, testified on the part of the defendants:

Direct examination.

By W. E. Miller:

I live in Des Moines. Am in the employ of Fleming Bros. as bookkeeper, and have been so employed since the 17th or 18th of February, 1910. Have had charge of the books kept by Fleming Brothers, Incorporated, and Fleming Bros., including the insurance accounts, and all other books of account kept so far as the brothers Fleming are concerned, and have been doing this since the date mentioned in 1910.

Since the commencement of this suit which is now on trial, I have examined and familiarized myself with the books of account of the Fleming Bros. kept in years previous to the time I became book-keeper; have investigated all of the books of account now in their possession and familiarized myself with them. These books of account run back to about the year 1888, the Dubuque books back in 1888. There is a continuous series of account books, ledgers, 63 journals, cash books, and the usual paraphernalia of book-keeping, reaching back to that time and I have gone through every one of them.

I have examined into the question as to how the personal items of the four brothers were entered upon the books. I have examined into the question of how the funds of the "brotherhood," as it may be called, have passed from the joint fund into the hands of the individual members. Have examined into the question as to how the dependent members of the Fleming family have derived their funds from the same common source, and the method by which the personal expenditures of the four brothers were taken care of as a matter of bookkeeping. I have examined into the question as to what was done in the way of accounting for funds turned over to Mrs. Robert Fleming and to the mother and sister of the four brothers and to Mrs. Charles Fleming. In other words, I have thoroughly familiarized myself with the internal financial history of the various members of the Fleming family group as shown on these books from some time in 1888 down to the present time. I know how their banking has been done.

There never has been an individual banking account kept by any of the four brothers except two years ago for convenience during the summer months we deposited a Fleming Bros. check in a bank at Spirit Lake for Mrs. Fleming to draw upon while she was running the cottage during the summer and for convenience she signed checks "R. J. Fleming," and then in the fall that was all charged off in the Okoboji House Account and finally goes into the Profit and Loss, and that account is closed out.

64 I think Mr. R. J. at one time had a separate deposit of political funds, but the account of that was kept in a separate set of books.

Q. When he was helping to save the country?
A. Yes.

But that had nothing to do with the individual interest or the property interests of any member of the firm and the items were not entered upon the books of Fleming Bros., nor of Fleming Brothers, Incorporated.

At no time during my acquaintance with the brothers did Charles Fleming have an individual bank account nor did any of the others, and in my investigation of the books kept prior to my active connection with it, I have never discovered any evidence that any of the individual members of the brotherhood maintained at any time an individual bank account. All of the checks I find were signed, "Fleming Bros., General Agents," or "Fleming Bros., Managers," or

just "Fleming Bros." The appellation of "Managers," or "General Agents," had to do with their insurance business. They were either managers or general agents for the Insurance Company.

My examination into all of the books shows that all items of house rent have gone into a "House Account," and at stated times have been charged off to "Profit and Loss." There have been periods of time during which certain members occupied rented houses. I find on the books that up to 1896 all house rents went into one general house account called, "House," and then at a stated time, that went off to "Profit and Loss," but in December, 1896, there seems to have been a little separation as I find "Charles Fleming House," 65 and "R. J. Fleming House," and then the House account that seems to be the mother's. It said, "Mrs. Jane," and these accounts were all charged off to Profit and Loss.

Q. Now, what would be the character of the items that would enter into, we will say, the John Fleming House Account?

A. There would be the rent, the groceries, and the money that was given his mother or his sister, meat bills, and things like that.

And that would be entered on the debit side of that House Account and at the end of a stated period, those debit items would be footed and that footing carried into Profit and Loss.

Q. Now, state whether or not the same thing obtained in the House Account of Charles Fleming.

A. It did.

Entering into the Charles Fleming House Account there would be house rent, groceries, meat bills, ice, telephone, and the currency or checks which Mrs. Fleming had, and at stated periods that would be footed and the footing charged off to Profit and Loss, and in charging these items to Profit and Loss that disposed of them so far as the process of bookkeeping was concerned.

Q. Now, did the same practice obtain with reference to Robert Fleming in his household?

A. The same.

Q. How was Mr. Stanhope's end of the matter handled?

A. Well, we have an account that is just "Stanhope Fleming" or "S. Fleming," and his hotel bills and the checks which he drew for his personal use are charged into that account, and at stated intervals go off to Profit and Loss.

Mr. Stanhope for a number of years prior to July, 1916, spent most of his time in Omaha. He did not maintain a household, being an unmarried man, but his board bills, and personal expenses would come in and be charged in the account of "Stanhope Fleming Personal," including traveling expenses and the like of that, and at stated intervals the debit side would be footed and the total carried into Profit and Loss.

Q. Now take these personal accounts and House Accounts, of all of the four brothers, what appeared on the credit side of them?

A. Well, not anything, except once in a great while if we would charge something to one of them or to one of the house accounts, and perhaps it would come back you know, that they did not use

it, or the check was not used, then that would come as a credit. I remember one instance. They were getting quite a quantity of meat and some of the meat was sold to one of the girls in the office, and that was all charged I think to Mr. John's house account, and then the credit for the meat which this girl took was given. That would be all the credit except the Profit and Loss item.

Q. That is what I want to get at. As a general proposition and with but few exceptions, as I understand you, the only credit item in any of these personal accounts would simply be the Profit and Loss item?

A. Yes.

Q. Which was the exact equivalent of the amount charged up on the debit side?

A. That is it.

Q. And that balanced the account?

A. That balances the account.

67 From time to time, Mrs. Robert Fleming would obtain funds at the office on a check which would be signed, "Fleming Bros." If one of the men were there to sign it, we would have it signed, if not, we had funds in the cash box and we would cash a check for her and have the check signed later on, then the amount of it would be charged to "R. J. Fleming House Account." I know of instances where Charles Fleming, for example, would sign a check in favor of Mrs. R. J. Fleming. He would sign "Fleming Bros." and John Fleming the same way, and Hope if he happened to be there, just the same, and the checks would be charged to the House account. We would do the same way with Mrs. Charles Fleming and the checks on which she got money were charged in the "Charles Fleming House Account" and would then go into Profit and Loss.

I know about the brothers carrying insurance on the lives of each. There was a series of policies on the life of Robert and a series on the life of John, and another series on the life of Stanhope, and another series on the life of Charles. The premiums on all the policies were paid by Fleming Bros. Since my time we have what is called, "Fleming Bros. Insurance Account," and the premiums were charged to that, but I have found in going through the old books that through a couple of years these premiums went into just a general expense account and that went off to Profit and Loss just the same as our insurance account does. Whether the premiums were charged in an insurance account or in an expense account they went off into Profit and Loss and in that way we got the balance on our books.

68 I never in my experience in bookkeeping for Fleming Bros. at any time ever carried to the credit of Robert Fleming any earnings as salary, dividend, or anything of that sort, nor have I carried any such item or items to the credit of any one of the four brothers. The only instances I have been able to find where any of the four brothers has been credited with anything in the way of earnings, salaries, dividends, or anything of that sort is that in the older ledgers, I find an account called, "R. J. Fleming, Renewals," and "Charles Fleming, Renewals," and "John Fleming, Renewals," and that went off to Profit and Loss. That represented

the renewals on their insurance work on premiums that were paid in but it was disposed of as a Profit and Loss item.

I have never ascertained or located anything in the nature of a balance sheet as between the four brothers. I have never found anything like a trial balance between the four brothers. There is nothing on the books showing or tending to show that at any time throughout the entire history of these books of account twenty-eight years, or such a matter, any balance has ever been struck between the four brothers, or any of them.

Q. If you were to go at — today, Miss End, as a bookkeeper to determine which brother had drawn the greater amount of funds from Fleming Bros., how would you do it?

A. Well, I would have to go back and pick out from all of these accounts what each one had had, and in some places that would be hard to do because in some of the accounts it just says, "Cush," and does not show to whom it went.

I have never been able to discover on the books any trial balance or anything indicating any division or attempted division as 69 between the brothers, or as between any other members of the family group. I have never been able to discover anything on the books indicating any attempt at an equalization as between the brothers. I cannot tell from the books whether R. J. Fleming has drawn more than John, nor whether Stanhope has drawn more or less than Charles. I could not make any comparison on the face of the books as between the relative drawings of the four brothers. I would have to go back and pick out from all of these old accounts, — pick out every entry and determine as best I could what was meant by some of those cash items.

Q. Now, on the other hand, have you any means of determining from those books how much John Fleming, for example, has earned for the firm?

A. No.

Q. Or any other member?

A. No.

Q. You have no means of determining whether John or Charles or Robert or Stanhope, or any one of them earned more or less than the other?

A. No, I have no way.

There are no credit items to guide me in that—not a thing.

In later years there is what is called a "Fleming Bros. Personal Account," which is a different thing from the John A. Fleming Personal Account or the Charles Fleming Personal Account, etc. It was a sort of general Fleming Bros. personal account. Into this account went items which were not easily divided between the brothers, such as gifts which they gave, flowers and things like that, Christmas gifts, doctor bills, music boxes, traveling expenses, funeral ex-

70 penses of the mother and sister and of Mr. Charles. The rail- road expenses for the ladies or dependent members of the family often went into that account. If those items did not

go in there, it was a mistake on the part of us who were keeping the books. I understand the word "dependent" members refers merely to the non-producing members of the family. In this Fleming Bros. Personal Account, appear items such as, for instance, "Grommes & Ulrich," cigar bills, some clothing.

When I came into the office they were just running this Fleming Bros. Personal Account and into that went all of the clothing. But Mr. R. J. would come out and ask when he got three or four shirts and from whom he got them, and I would have to dig through this whole account and find the item. So we decided for convenience in our work that we would separate it as much as we could, and that is what we have been trying to do these later years. When one man got clothing or anything like that we tried to put it to his personal account.

The footing of this Fleming Bros. Personal Account goes to Profit and Loss.

I recall that for a time the three households of R. J., Charles, and John, all occupied places in the Chamberlain flats. The rents for all three were paid to Lowell Chamberlain in one check each month.

When I first came into the business Mr. John's household consisted of himself, his sister, and Mrs. Bulger, and Stanhope stayed there when he would be in Des Moines. Mr. Charles' household consisted of himself and his wife, and Robert's household consisted of himself and his wife and two children.

71 & 72 There was never any distribution as between the brothers of any profit and loss balance at any time throughout the history of this bookkeeping.

73 & 74 I never had any instructions from any of the brothers placing any limit upon the amount which should be turned over to the plaintiff or to Mrs. Robert Fleming or to any other of the dependent members of the family, as I have called them. We have invariably furnished the ladies with what they asked for.

75 Cross-examination.

By J. M. Parsons:

The checks payable to Mrs. Charles Fleming about which I have testified found their way into the Profit and Loss account finally. They were charged up to the House account of Charles Fleming and then charged off as I testified and they also appear as part of the summary of these exhibits which include the entire Profit and Loss account of Fleming Bros. from 1887 and 1888, and on. The same thing would be true as to the method and manner of disposing of checks issued to any other member of the Fleming family. For instance: if Robert's wife would get a check, that would be charged to the house account of Robert Fleming. The checks in favor of Robert Fleming's children we have been charging separately for convenience in their banking. We have been supplying Robert's children with checks of the corporation. It was simply for convenience in banking, but all the other expenses of Robert, outside

of what was paid to the children, would go into the Robert Fleming House account.

This Church and Lodge account always went into Profit and Loss. It was simply a separate account kept there by the bookkeepers for their own convenience so as to be able to find these items when any of them were inquired about. That also was just the reason for finally separating the accounts of the different brothers. If Robert wanted to find out when he bought some shirts, I could go to his account and find it without looking over the balance of the accounts. It was all merely a bookkeeping convenience. This Church, Lodge, and Club account was simply another source of getting the expenditures into the Profit and Loss account.

I also kept the books of Fleming Brothers, Incorporated.

76 There, we have these different expense accounts. Our janitors and supplies, and things like that all go off to the Profit and Loss of the corporation. If there is a general balance, that must stand there.

I do not believe we have a balance. It is cash and just carried on. There were no dividends ever declared.

Q. So it does not go into the partnership?

A. There is no partnership.

Q. What I mean is, it does not go into the books of Fleming Bros.?

A. No.

On the corporation's books there is a salary account. We simply have an account which we credit as "Fleming Bros. Salary."

Q. Is there not a corresponding entry made on Fleming Bros.?

A. No, we charge against this Fleming Bros. account the interest which we pay on money which we have to borrow to keep the thing going and various little items like that.

Q. The interest that the corporation borrows?

A. Well the Fleming brothers borrow it.

Q. The interest of the Fleming brothers?

A. We have made certain rules to simplify our bookkeeping. Every bit of interest we pay, we pay with the Fleming Brothers, Incorporated check whether they borrow it or not, so at the end of the year there would be money borrowed by Fleming Bros. and the check of Fleming Brothers, Incorporated would be charged against it and the salary account is run to offset that.

Now, as to this account of salaries paid the Fleming brothers by the Insurance Company, when they were on a salary there was no attempt at separation of the amounts earned by the different 77 brothers. All of the salaries went into one account and found their way into Profit and Loss.

78 There was no exact stated time when these personal accounts of Fleming Bros. and House accounts, etc., were charged off. It was sometimes six months and sometimes a year. In one instance I noticed it ran about three years and at another time they were charged off every three months, but eventually these

things all found places in the Profit and Loss account. They would be charged to the debit side of the Profit and Loss account. Anything that came in that was profit would be charged on the credit side and the outlay would be charged on the debit side.

79 & 80 ROBERT J. FLEMING, one of the defendants, testified as follows:

Examined by W. E. Miller:

I was sixty years old September 2, 1916. Am a brother of John and Stanhope Fleming who are also defendants here. Am president of Fleming Brothers, Incorporated.

I am and for years have been a member of the brotherhood or aggregation known as "Fleming Bros." My brother, Charles Fleming, was a member of that group during his lifetime. He died January 15, 1916.

81-83 After our father died we conducted our financial relations in the family exactly the same. We ran that business under the style, George G. Mead, survivor of himself and Stanhope Fleming, until some time in '84 when a partnership was made. Failure was very certain and a man who was a considerable creditor came in and a new firm was made called Grimes & Flemings. Each of the Flemings were taken in, indeed my mother and sister, all except Stanhope whom we call Hope.—he was not of age and was not a party to that partnership. Mr. Grimes took the place of Mr. Mead giving us a contract, I think, that we were to pay the debt that was owed him, if I remember correctly, and interest on it, and any money that he would necessarily invest up to five years. If we did not do that in five years, why then he was to have half of the property.

That business failed the next year, 1885. They had built good mills all around us and changed the old burr mill into roller mills and our business was very much affected by that. We wound up a little of that business within the last few years and paid them. We have been paying them in every quarter that we have lived in since. During that time my brother, Charles Fleming, was not engaged in any other line of business. We were all engaged in the same business and got our living through the same fund or source and never had an account between each other.

My brother Charles was married January 2, 1881 to the plaintiff in this case.

84 Q. What agreement did you have during all these years down to and including the year 1896 with your brothers, John and Stanhope, in reference to what would occur and how the property should be disposed of in the event of the death of any one of you?

Objected to as immaterial and incompetent.

A. Why, the arrangement was that we all worked together and we had what we needed to live on when we had it and we pooled the

whole thing and when I should die then the other three would have it and when another one would die, and so on until the last Fleming would have it all.

Q. You may state whether or not during all those years down to and including 1896 your brother Charles was engaged in any business with any one else except you three brothers?

A. Never for an hour of his life.

Mr. Parsons: The question *proceeding* the last one, I wish to add to the objection I made, "and move to strike it out on the ground that it is incompetent and in the light of the last question and answer, the witness is incompetent to testify thereto under the statute."

85-87 At the time these contracts, exhibits 101 and 102, were made, none of the four brothers owned real estate, and the four of us did not have title to any real estate which has not since been disposed of.

88 Exhibit 104 is a contract between the Massachusetts Mutual Life Insurance Company of Springfield, Massachusetts, and Robert J., Charles, and John Fleming of Des Moines and Stanhope Fleming of Omaha, Nebraska, bearing date August 1, 1908. I recognize the name "Charles Fleming," attached thereto as the genuine signature of my brother, Charles Fleming. It also bears the genuine signature of Stanhope, John A., and myself. That is the contract under which the Fleming Bros. have represented the Massachusetts Mutual Insurance Company as its general agents. The contract has been in force continuously from August 1, 1908, except some modifications as to the territory.

Defendants now offer and read in evidence.

EXHIBIT 104 TO TESTIMONY OF ROBT. J. FLEMING

Objected to by the plaintiff as immaterial and incompetent.
The contract recites the duties of the agents in

§ 1. That said Company hereby appoints the said Flemings, as such general agents to solicit applications for life insurance 89 & 90 in said Company, to collect and pay over premiums, etc., etc., devoting their time to the business of the company, etc.

§ 2. That said General Agents may, personally and by agents in their employ, solicit applications for insurance in said Company in the following territory: The States of Iowa and Nebraska; with headquarters in Des Moines aforesaid; also the State of Wyoming. * * *

§ 3. That if said General Agents shall employ other persons to solicit applications for insurance, or in any other capacity in connection with their agency, they shall be responsible to said company for all matters entrusted to such persons. * * *

§ 4. contains a schedule of commissions.

§§ 5 to 12 relate to reservations, collection fees, changes in rates of commissions, commissions on changed policies, commissions on

transferred collections, post-termination commissions, sub-agents' commissions, deposits, reports, etc.

§ 13 fixes allowances for office rent, traveling expenses, etc.

§ 14 provides for renewal commissions.

§ 15. That the death or withdrawal of one or more of the members of said firm leaving one or more of them surviving, shall not terminate this contract, which shall continue in force subject to all of its provisions; it being agreed, however, that all of the commission or other rights of deceased or withdrawn members of said firm shall pass to the surviving member or members, anything in this contract to the contrary notwithstanding.

§§ 16-25 contain other provisions immaterial in this case.

In witness whereof, the parties to this contract have subscribed the same in duplicate, the day and year first above written.

Massachusetts Mutual Life Insurance Company,

Massachusetts Mutual Life Insurance Company, By John A. Hall, Pres. Robert J. Fleming, Charles Fleming, John A. Fleming, Stanhope Fleming.

91 This stock book of Fleming Brothers, Incorporated contains a series of stock certificates, cancelled. The cancelled certificates were those which had been issued to and carried in the names of the four Fleming brothers up to the time of Charles' death. On or about April 12, 1916, these certificates were cancelled and a similar amount issued in lieu thereof to R. J. Fleming, John A. Fleming, and Stanhope Fleming or the survivors or survivor of 92 them. There is a series of them, the first one is No. 65 and the last one No. 96. On the back of each certificate is an assignment in blank. This assignment on the back of 65 bears my signature; also 69, 70, 71, 72, 73, 74, and 93. Those are all my signatures. These assignments on 65, 69, 70, 71, 72, 73, and 74 were all executed by me December 1, 1906. The assignment on certificate No. 93 was executed by me November 30, 1914.

The defendants now offer and read in evidence stock certificate No. 65 which reads as follows:

"Incorporated under the laws of the State of Iowa. No. 65. Shares 104. Fleming Brothers Incorporated Des Moines, Iowa. This certifies that Robert J. Fleming is the owner of 104 shares of \$100 each of the capital stock of Fleming Brothers Incorporated. Transferable only on the books of the corporation by the holder hereof in person or by attorney upon surrender of this certificate properly endorsed. This stock is fully paid and non-assessable.

In witness whereof the said Corporation has caused this certificate to be signed by its duly authorized officers and to be sealed with the seal of the corporation this first day of December, A. D. 1906.

(Signed) Robert J. Fleming, President, John A. Fleming, Secretary. (Corporate seal.) Fleming Brothers, Incorporated."

And on the back of the certificate the assignment in blank reads as follows:

“For value received — hereby sell, assign and transfer unto — — shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint — — to transfer the said stock on the books of the within named corporation with full power of substitution in the premises. Dated — 93 —, 19 —. Robert J. Fleming. (And at the left hand corner.) In presence of Katherine D. Ives.”

STIPULATION

It is conceded by the plaintiff at the request of the defendants that certificate 69 for 500 shares, and certificate No. 70 for 500 shares, and certificate 71 for 50 shares, and certificate 72 for 50 shares, and certificate 73 for 30 shares, and certificate 74 for 16 shares making a total of 1,250 shares are identical in form and in date and in form of assignment with certificate No. 65. The 1,250 shares mentioned being inclusive of certificate 65.

Witness resumes: Stock certificate No. 66 in this same book was issued to Charles Fleming and was dated and assigned in blank the same day, December 1, 1906.

I recognize the name of Charles Fleming as it appears on the back of certificate No. 66 as being the genuine signature of my deceased brother, Charles Fleming. The same is true as to certificates 75, 76, 77, 78, 79, and 80. That makes 1,250 shares.

STIPULATION

It is agreed that certificates 66, 75, 76, 77, 78, 79, and 80 all bear date December 1, 1906, and that they are in form identical with the certificate No. 65 already read into the record and that the form of assignment on the back of each is identical therewith.

Witness resumes: Certificate No. 94 is in the name of Charles Fleming for 1,250 shares dated November 30, 1914. That is the date of the issue and the date of the assignment. The assignment 94 bears the genuine signature of Charles Fleming.

STIPULATION

It is conceded that certificate No. 94 and the assignment on the back thereof are in the same form as No. 65 heretofore set out.

Witness resumes: Certificate No. 67 for 104 shares is in the name of Stanhope Fleming dated December 1, 1906, and assigned by Stanhope Fleming. I recognize the signature of Stanhope Fleming on the assignment on the back of the certificate No. 67 also on No. 81 for 500 shares and on 82 for 500 shares and on 83 for 50 shares and on 84

for 50 shares and on 85 for 30 shares and 86 for 16 shares, all issued to Stanhope Fleming and all assigned by him in blank.

STIPULATION

It is conceded that certificates Nos. 67, 81, 82, 83, 84, and 86 issued to Stanhope Fleming are identical in form with the assignment on the face of certificate 65 which is already spread in the record.

Witness resumes: Certificate No. 95 is in the name of Stanhope Fleming dated November 30, 1914, for 1,250 shares. I recognize the genuine signature of Stanhope Fleming on the back.

35

STIPULATION

That certificate is conceded to be in the same form on the face and as to the assignment as certificate No. 65 which is spread in the record.

Witness resumes: Certificate No. 68 for 104 shares, No. 87 for 500 shares, No. 88 for 500 shares, No. 89 for 50 shares, No. 90 for 50 shares, and No. 91 for 30 shares and No. 92 for 16 shares all dated December 1, 1906, are issued to John A. Fleming and assigned in blank by him the same date, the assignment bearing his genuine signature. No. 96 is for 1,250 shares issued to John A. Fleming dated November 30, 1914, assigned the same date, the assignment bearing the genuine signature of John A. Fleming.

STIPULATION

It is conceded that certificates Nos. 68, 87, 88, 89, 90, 91, 92, and 93, issued to John A. Fleming are identical on the face and as to the form of assignment with certificate No. 65 which has been spread upon the record, and that they bear the genuine signature of John A. Fleming wherever it appears upon those certificates.

Witness resumes: Certificate No. 93 issued to me for 1,250 shares was assigned the same day.

After these certificates of stock had been issued to me and had been assigned in blank by me, I placed them in a common receptacle where all of this stock was placed, where they could be found. I recognize the envelope, exhibit 110, as being the one which 96 always contained the first issue of certificates and I recognize exhibit 111 as an envelope that contained the issue of November 30, 1914, of 1,250 shares to each of us and this was deposited in with the others in that first envelope.

Right after the certificates, Nos. 66, 75, 76, 77, 78, 79, and 80 had been issued to Charles Fleming, I observed that they were enclosed in and filed in and deposited in this envelope, exhibit 110. The same thing is true as to the certificates which have been issued in the names of myself and John and Stanhope. The entire 5,000 shares issued back in 1906 I know have been contained in this large envelope, exhibit 110. I have seen them in that envelope many times since. They continued in that envelope until they were can-

celled subsequently to the death of our brother. They were cancelled on April 12, 1916. It is a fact that all of these certificates which had been issued to my brother Charles were at the time of his death contained in this envelope, 110, together with all of the rest of the certificates.

Immediately after certificate No. 94 for 1,250 shares had been issued to Charles Fleming on or about November 30, 1914, I observed it in this envelope, exhibit 111. This was immediately after its issue and the issue of all of the other three certificates. The same was true in regard to No. 93 issued to R. J. Fleming, No. 95 issued to Stanhope Fleming, and 96 to John A. Fleming. They were immediately put in that envelope with Charlie's certificate. They remained in that envelope. At the time of the death of Charles Fleming all of those certificates including No. 94 were in that same envelope.

97 During the first year after these certificates were issued the envelope containing them was kept in a safe that was owned by the Mutual Life Insurance Company. After giving up our agency for that company and commencing with the Massachusetts Mutual, we bought a safe and the certificates have been in a box in that safe ever since. The box contained the stock and stockbook and the minute book of the meetings of Fleming Brothers, Incorporated, and of another organization in which we were part owners.

All four of us brothers at all times had access to that receptacle and to these envelopes and to the stock certificates which they contained. We always had access to it, in fact I think that drawer that contained them never was locked.

Q. Mr. Fleming, what was your purpose and your object in assigning your certificates of stock in blank and in enclosing them in these envelopes, exhibits 110 and 111?

Objected to as immaterial.

A. I did it to deliver the stock to the survivors of this survivorship contract arrangement.

My brothers and I took advice on the subject at or about the time the thing was done. We were all together. It was done when the first stock was issued. I think we consulted Mr. Guernsey. He drew up the papers merging The City Real Estate Company or changing its name to Fleming Brothers, Incorporated. At that time The City Real Estate Company stopped and its stock was cancelled and this new stock was issued. I know that my brothers, John and Stanhope, endorsed their certificates of stock in blank and deposited them in this envelope for the same purpose and pursuant to the same advice.

98 Q. Do you know of any reason other or different from that which controlled your own action which caused your brother Charles' stock to be deposited in these envelopes and kept in the same way as your own?

Objected to as immaterial and for the further reason that it is not competent, and again the witness is not competent to testify, in-

cluding as it may communications between the witness and the deceased under section 4604 of the code.

Q. In my question, Mr. Fleming, I am expecting you to exclude any conversation or transaction which you had with your brother Charles.

Same objections.

A. I know there was no other reason.

Defendants offer and read in evidence exhibits 110 and 111 and the endorsements or engrossments thereon, as follows:

EXHIBIT 110 TO TESTIMONY OF ROBT. J. FLEMING

being a manilla envelope 4 $\frac{3}{4}$ by 10 $\frac{1}{4}$ on which is endorsed the following:

99

Stock Certificates

Fleming Brothers, Incorporated

R. J. F.	#65	— 104
	69	— 500
	70	— 500
	71	— 50
	72	— 50
	73	— 30
	74	— 16
		— 1,250
Chas.	#66	— 104
	75	— 500
	76	— 500
	77	— 50
	78	— 50
	79	— 30
	80	— 16
		— 1,250
Stanhope	#67	— 104
	81	— 500
	82	— 500
	83	— 50
	84	— 50
	85	— 30
	86	— 16
		— 1,250
J. A.	#68	— 104
	87	— 500
	88	— 500
	89	— 50
	90	— 50
	91	— 30
	92	— 16
		— 1,250

100 EXHIBIT 111 TO TESTIMONY OF ROBT. J. FLEMING

being a white envelope 4 $\frac{1}{8}$ x 9 $\frac{1}{2}$ bearing the following:

Return in 3 days to
Fleming Bros.,
Des Moines, Iowa.

(Cut of Fleming
Building.)

Certificates of Stock, Fleming
Brothers, Incorporated,
No. 93, R. J. Fleming, 1250.
94, Charles Fleming, 1250.
95, Stanhope Fleming, 1250.
96, John A. Fleming, 1250.
Issued November 30, 1914.

Cross-examination.

By J. M. Parsons:

This stockbook about which I have been testifying is the book of the certificates of shares of the Fleming Brothers, Incorporated. I don't know why the certificates began with No. 65 unless that was the consecutive number after The City Real Estate stock. I think that at the time of the death of Charles Fleming certificates No. 65 to 96, both inclusive, were all of them outstanding certificates of stock.

Across the face of the certificate, No. 65, there is endorsed in red ink the following:

"April 12, 1916. Certificates Nos. 65, 66, 67, 68, 74, 79, 80, 85, 86, 91 and 92, cancelled and re-issued and included in Certificates Nos. 108, 110, 111, 112, 113, 114, 115, 116, 117, and 118. John A. Fleming, Secretary."

I knew of that endorsement at the time it was made. It was on that date, April 12, 1916. There is the same endorsement in red ink on No. 66 except as to the numbers of the certificates enumerated.

101 As a part of the cross-examination, the plaintiff reads in evidence the following endorsement in red ink on the face of Certificate No. 66:

"April 12, 1916, Certificate- Nos. 65, 66, 67, 68, 74, 79, 80, 85, 86, 91, and 92, cancelled and re-issued and included in Nos. 108, 110, 111, 112, 113, 114, 115, 116, 117, and 118. John A. Fleming, Secretary."

That is a certificate that had been issued to Charles Fleming. The sum and substance of the matter is that these certificates, Nos. 65 to 96, inclusive, were all taken up and cancelled on the 12th day of April, 1916, and their place taken by a reissue of stock in the names of the three survivors, and this stock was issued in certificates 97 to 118, both inclusive.

Certificate 97 is for 6000 shares issued to Robert J. Fleming, John A. Fleming, and Stanhope Fleming, or the survivors or survivor of

them jointly and not as tenants in common, dated April 12, 1916. All of these certificates that were issued, Nos. 97 to 118 both inclusive, are phrased in the same way and the stubs of all of them read the same way.

All of the stock in Fleming Brothers, Incorporated, that had been issued was issued one-fourth to myself, one-fourth to Charles, one-fourth to Stanhope, and one-fourth to John A. prior to this last issue we have been talking about, and this last issue of April 12, 1916, was made to take up and cancel all the former issues.

All of the certificates, Nos. 65 to 96 inclusive were placed in this envelope, exhibit 110, and the endorsement thereon was to show

what the envelope contained. The endorsement opposite the 102 initials, "R. J. F." shows the numbers of the certificates and the number of shares in each and the same is true of the other names, Charles, John, and Stanhope as endorsed thereon. This later issue of certificates Nos. 93, 94, 95, and 96, were placed in another envelope with practically the same endorsement and these all remained there in the safe of Fleming Bros. They might have been taken out a half a dozen times a year but, if so, they were put back in the drawer that contained that stuff. That drawer was their resting place and if they were out of it at all, it would be simply for some temporary purpose.

103 & 104 Redirect examination.

By W. E. Miller:

There were no bank stocks outstanding in the name of Charles Fleming at the time of his death. The bank stocks enumerated in this balance sheet, whether standing in the name of myself, John, or Hope, belonged to Fleming Bros., or to the survivors or survivor of them. They were all paid for with the funds of Fleming Bros. and were all carried on the books of Fleming Bros. regardless of the individual name in which they may stand.

Recross-examination.

By Mr. Parsons:

I do not think any of these bank stocks ever stood in the name of Charles Fleming. They were transactions that happened here and Charlie might not have been here. I do not think a dollar of any of these stocks other than the Fleming Brothers, Incorporated, ever stood in Charlie's name.

We speak of Fleming B-r-o-s. to distinguish it from the corporation, the name of which is "Fleming B-r-o-t-h-e-r-s, Incorporated."

105 Miss KATHARINE D. IVES, sworn and examined on behalf of the defendants:

I live in Des Moines at Tenth and Des Moines Streets. Am in the employ of Fleming Bros. and have been for over seventeen years.

Q. I hand you, Miss Ives, the stock book of Fleming Brothers, Incorporated, which is recognized as such in this case, and ask you to look at certificates of stock—I will say cancelled certificates of stock numbered from 65 to 92, both inclusive, and ask you to look particularly at the names of the four Fleming brothers appearing upon the back of these certificates, and at the name "Katherine D. Ives," as it appears there as a witness, and ask you to state whether or not the names of the brothers were signed there in your presence? You can run through them one by one.

A. I witnessed all those signatures.

Q. I call your attention also, Miss Ives, to certificates numbered 93 to 96 both inclusive, and ask you if they bear your signature as witness, and whether you saw the assignments on the back of them signed by the persons named? That is, respectively by John A. Fleming, Charles Fleming, Robert J. Fleming, and Stanhope Fleming?

A. Yes, sir; I witnessed those signatures.

I have many times seen each of the four brothers sign his name and I recognize those signatures which I have witnessed as being the genuine signatures of each of the four brothers.

I know that these certificates of stock were always kept in the safe. All of the certificates issued to all of the four brothers were always kept together.

The dates on the stock certificates would show about the time I witnessed their several signatures. It was years ago,—long before the death of Charles Fleming.

The assignments on the stock certificates, 93 to 96, were made about the time the stock certificates were issued. All of the four certificates were kept in the safe. I have seen them there many times myself from time to time.

I recognize this envelope, exhibit 110. It has been in the safe for years. All of these certificates of stock were kept in that envelope. I also recognize the envelope, exhibit 111. That also has been in the safe.

108 Miss ADDIE E. END recalled on behalf of the defendants:

Examined by W. E. Miller:

I know that the writing on the envelope, exhibit 110, is the handwriting of Miss Foss. I also know that this was the envelope in which the stock certificates were kept and that this envelope was kept in the safe. I also know that the envelope, exhibit 111, is the one in which the four shares—the last stock that was issued, were kept. They were kept there prior to the death of Charles 109-111 Fleming. The envelopes were kept in one of the drawers in the safe where I would run into it. That drawer was not locked, and all of the brothers had access to it. That drawer contained both of these envelopes with their contents. That has been true ever since I have been employed there and continued to the time of the death of Mr. Charles Fleming. It was February of

1910 that I went to work there and these envelopes containing the stock certificates continued to be in that drawer to my knowledge up to the time that the stock was reissued.

112 JOHN A. FLEMING, one of the defendants, testified as follows:

Examined by Mr. W. E. Miller:

Am fifty-four years of age. Single. Robert J. and Stanhope Fleming are my brothers. Charles Fleming was in his lifetime.

113 Q. When was the first knowledge you had, Mr. Fleming, of the idea which you say obtained among you of keeping all of the funds in one account and spending from that joint account for the family needs?

A. The idea was inculcated in us by our father and mother. I don't know when it did begin. We began when we were 114 children working with our father about this mill without any pay or thought of pay. We got what money we needed and he bought our clothing, or our mother did when she did not make it. That was the way we got along in childhood, the same as we have since.

I have never known of or operated under any different arrangement than that up to the present time.

None of my brothers ever owed me anything. I have never owed any of my brothers anything. There never has been any attempt at a partition or division of money of any sort between us brothers.

I have heard the testimony of Miss End and Miss Foss, the bookkeepers. Most of my personal expenditures are charged up to J. A. Fleming, personal account, but I don't imagine all of them are. I think I got a great deal of my expenses from my brothers and Charlie did in his lifetime. The J. A. Fleming house account is for our home. It was my mother's home and my sister's 115 home and now my brother Stanhope and myself and our cousin, Mrs. Bulger, live there.

I am familiar with what is called the Fleming Bros. Personal Account on our books and am and have been cognizant of its contents. Well, I don't know the reason that dictated the division of these items of expense into these several accounts which have been shown here in the evidence. I could not state any particular reason for it except the bookkeeper separated them and this Fleming Bros. Personal Account has our clothing and all presents and anything that is a little unusual like Christmas presents and trips away. There are a good many items in it but they are a little different from our personal account or our house expense. No attempt has ever been made to reconcile these various accounts or to discover anything about their relative equality or inequality between the four brothers. No such distinction or difference has been made.

Q. Have you at this moment, Mr. Fleming, even as the result of all your investigations in this case, have you at this moment any idea as to the relative amounts that have been drawn by the four brothers during all of the years of your association?

A. I have not, no sir, and I would not know what any of them had drawn today excepting for this suit. We began to check it up, and I would not have been able to tell within a thousand dollars of any one's account, I am sure, in one year.

Q. Are you interested in or concerned in that inquiry at all personally?

A. No, sir.

I am perfectly familiar with the stock book of Fleming Brothers, Incorporated, and all of the certificates of stock which have 116 been issued and cancelled and which are attached there. I

am the Secretary of Fleming Brothers, Incorporated, and have been since that name was adopted. The cancelled certificates, Nos. 65 to 92, both inclusive, were issued on or about the date they bear, December 1, 1906, and at the same time were endorsed by each one of us and filed away in a drawer in the safe. I am familiar with the signatures attached to the various assignments on all of these certificates. I have seen my brother Charles write and sign his name many times. I recognize as genuine his signature there on certificates Nos. 66, 75, 76, 77, 78, 79, and 80. Those are his genuine signature. I also recognize as genuine the signatures of my brothers, Robert J. and Stanhope, as they appear on these certificates of stock. They are all genuine. Mine were signed at or about the time of the issuance of the certificates, and I know that my brothers, Robert J. and Stanhope did the same. On the same day I saw the certificates issued to my brother Charles and bearing his signature to the assignment, had been placed in this same envelope, exhibit 110. And I suppose I have seen them weekly ever since. All four sets of certificates were in this envelope. And it was kept in a drawer in a safe. I think there was a lock on that drawer but it has not been locked. The keys are hanging in it today as they always have. All four brothers had access to that drawer at all times since the stock was originally deposited there.

Certificates of stock Nos. 93, 94, 95, and 96, are dated November 30, 1914, and were issued about that date. No. 96 is endorsed by John A. Fleming, 95 is made out to Stanhope Fleming, and by him endorsed, 94 made to my brother Charles, and I recognize as genuine his signature on the back of it. I endorsed certificate 96 when it was made and put it in an envelope with the rest of them in the safe. R. J.'s certificate and Stanhope's were endorsed the same way at the same time. I always saw certificate No. 94 issued to Charles Fleming and bearing his signature in that envelope, exhibit 111. That envelope, exhibit 111, containing these certificates, was slipped inside of the other envelope with the other stock. So that the entire stock issue of Fleming Brothers, Incorporated, up to and including the time of the death of brother Charles was on deposit in this envelope in this open lock drawer every day. All four of us had access to them. In using the word, "endorsement," I have referred to these assignments in blank on the back of the certificates witnessed by Miss Ives.

119 I recognize the document handed me as the contract between the Massachusetts Mutual Life Insurance Company

on the one hand and Robert J., Charles, John A., and Stanhope Fleming on the other. I recognize the name, Charles Fleming, at the bottom of the contract as being the genuine signature of my deceased brother. I also recognize as genuine the other signatures including my own. That contract is still in operation and has been since the 21st of March, 1908. Exhibit 104 is a true copy of and has been substituted for the original contract.

120 Cross-examination.

By J. M. Parsons:

121-123 Fleming Brothers, Incorporated, own the real estate at the corner of Sixth and Walnut and a piece at Tenth and Grand avenues and a lot in North Des Moines worth \$300 or \$400. The corner of Sixth and Walnut on which the building stands is 66 feet by 132 and then on the west side of the quarter block we have 44 by 132 and between these two pieces we have a ninety-nine year lease on 22 by 132. That is the O'Callaghan property, so that it gives us a frontage on Walnut street of 110 feet and a depth of 132 feet.

I have never been married.

124 STANHOPE FLEMING, one of the defendants, testified as follows:

Examined by W. E. Miller:

Am fifty-two years of age. Am the youngest of the four Fleming brothers.

Robert left Michigan and went to Minneapolis in the spring of 1885, and I became twenty-one years of age June, '85. I recall the fact that when Robert and John went to Minnesota, Charles remained for a time at home in Michigan, where we lived. Charles was keeping house for a short time after they left, but later they came to my mother's home. John left in the spring of '86, and Charles left in the spring of 1887, two years after Robert had left. During that two years Charlie was working in the lumber yard off and on for the firm that succeeded us. Then we were making collections and I think we got up wood part of the time. I was there all the time Charles remained. I never knew of either Charles or myself working on the streets. I know that Charles did not work on the streets.

During that time in regard to the family finances, we were receiving remittances from Rob and we earned a little in the lumber yard and made some collections that we had to live on. All of this incoming revenue was turned into a joint fund, everybody using what they wanted. For a couple of years we were mixed up in litigations that required a good deal of time and also the making of these collections. I was producing some revenue myself and part

125 & 126 of the time I was sending money to the boys, Charlie, John, and Rob, and they were sending money to me. It would depend upon who had it. When I would receive funds it went to everybody in the family that needed it or that wanted it, including my mother, my sister, and the plaintiff.

After the railroad contract was completed, I know of brother Charles having taken in some real estate up in Minnesota as the result of trades of the remnant of the railroading outfit and of payments made from Fleming Bros. at Dubuque. Whatever was provided in the way of revenue with which to procure and pay for these real estate holdings in Minnesota, was provided by Fleming Bros. and when these holdings were disposed of from time to time, the proceeds went into Fleming Bros.' fund. From time to time real estate has been acquired here in Iowa and conveyed to outside parties by Fleming Bros. It was always paid for out of the joint funds and when sold the proceeds went into the joint fund. No one of the brothers has ever to my knowledge acquired or held any individual or separate estate in any real estate anywhere.

127 Witness resumes: I recognize this as the stockbook of Fleming Brothers, Incorporated. Have examined the signatures on the back of each of the certificates contained therein running from 65 to 96 both inclusive. I am familiar with the signatures of my three brothers. I have seen my brother Charles sign his name many times. The name, Charles Fleming, as it appears on the back of stock certificates 66, 75, 76, 77, 78, 79, 80 and 94 is the genuine signature of Charles Fleming.

All of the signatures of all of the brothers on all of these certificates I recognize to be their genuine signatures, respectively.

When stock certificates numbered 65 to 92, both inclusive were issued, they were all assigned and put in the envelope in the safe in the office of Fleming Bros. I identify exhibit 110 as being the envelope prepared for that purpose by Miss Foss, our bookkeeper. I have seen these certificates which were issued to and assigned by Charles Fleming in that envelope hundreds of times, during the life-

128 time of my brother, and they were there in the same place at the time of his death, in that same envelope. I also recognize exhibit 111 as the envelope that contained four certificates of 1250 shares each, which were issued in 1914. It contained certificates 93, 94, 95 and 96 of 1,250 shares each. No. 94 was the certificate issued to Charles Fleming. On the back of it I recognize as genuine his signature. That certificate along with the other three was kept in this envelope 111. It was put there immediately after the assignment of it was made, and I have seen it there from time to time during the lifetime of my brother and since his death.

The place in which these certificates were kept was a place to which myself and my brothers all had access.

I operated the insurance business in Omaha from 1895 down to about July of this year under the Mutual Life contract with Fleming Bros. and we used the term, "Fleming Bros., Managers," and operated under the Massachusetts Mutual contract as "Fleming

Bros., General Agents." All of the revenues of that business went into the joint fund and all of the expenses of the business were paid by checks made on the joint funds. My personal expenses were paid by checks made against Fleming Bros. joint fund. I never have at any time maintained an individual banking account. None of my brothers ever had an individual bank account so far as I know. I have never owned any property in my own individual right as distinguished from the joint property.

Q. Have you ever been in debt to any of your brothers?

A. Never.

Q. Have any of your brothers ever been in debt to you?

A. Never.

129-131 I have heard the testimony of Miss End, the bookkeeper, as to the various expense accounts of the Fleming brothers and of the family. That method as described by her was pursued with my knowledge and cooperation. I have never had anything to do with fixing the amount that was drawn from the funds of the firm or brotherhood by the non-producing members of the Fleming family. The amounts so drawn by them have been fixed by the individuals who wanted the funds.

I have never had any knowledge as to the relative amount of my earnings as compared with those of my brothers. I have never had and do not now have any idea as to the relative withdrawal of funds from the joint fund for my own use until we began in this case, I never paid any attention to it. There has never been any division or dividend as between us. There has never been any attempt at any time in any manner to ascertain the relative value of a supposed interest of any of us. All of the drawings have been charged off in Profit and Loss and no attempt made at any equal division.

I am familiar with the contract of Fleming Bros. with the Massachusetts Mutual which has been identified here in evidence. I am a party to that contract which is still in operation and was at the time of the death of my brother.

132 Cross-examination.

By J. M. Parsons:

I am a widower. Was married in 1892 and my wife died in 1894. I have no children.

All of the certificates of stock of Fleming Brothers, Incorporated which have been issued prior to the death of Charles have since been surrendered and canceled and new certificates of stock issued. The present outstanding stock is a reissue of this old stock in new certificates.

Q. There was not any particular attention paid into which shares of the present issue the old issues were merged, except to see that they were all taken up and new certificates issued to cover the whole of the capitalization, is that true?

A. Well, they were re-issued and made payable to the survivor or survivor, without the assignment on the *bank*.

These assignments on the back of the certificates had been signed in blank and were in blank at the time of Charles' death. None of them had been filled out. The re-issue took place April 12, 1916.

Q. Now I notice that on the back or on the face of a number of the certificates, being Nos. 65, 66, 67, 68, 74, 79, 80, 85, 86 and 92 is written the following: "April 12, 1916. Certificate Nos. (repeating the numbers that I have just read) cancelled and re-issued and included in Nos. 108, 110, 111, 112, 113, 114, 115, 116, 117 and 118. John A. Fleming Secretary." Now that entry you 133-135 understand was made there to show what had become of that stock?

A. I presume so.

Q. And the other certificates I notice on them, would be simply a recitation, for instance No. 69 re-issued into 101, and so on down the line?

A. I presume so.

136 Testimony closed.

The submission of said cause was completed at 10:55 a. m., Friday December 22, 1916, and the Hon. Charles A. Dudley took the case under advisement, saying among other things:

The Court: I am in harmony with both sides of this case to this extent, that these contracts must determine the rights of these parties in view of the provisions of our statute. So, as far as this case is concerned, it is now in the hands of the court, and there will be no further public proceedings in regard to it until I announce my opinion.

Thereafter, on the 14th day of April, A. D. 1917, the said judge, the Honorable Charles A. Dudley, filed in said cause a written opinion.

Thereafter, on the 23d day of October, A. D. 1917, there was made and entered of record in said court and cause the following

DECREE

Now on this 23d day of October, A. D. 1917, being a regular judicial day of the September Term of this court, this cause 137 coming on for final hearing and decree, plaintiff appearing by Parsons & Mills, her attorneys, and the defendants by Parker, Parrish & Miller and Albert B. Cummins, their attorneys, and all of the evidence and arguments having been heard by and submitted to the Hon. Charles A. Dudley, one of the presiding judges of this court, who filed his written opinion and decision herein on the 14th day of April, A. D. 1917, and he having since deceased, and the parties hereto by their counsel in open court agreeing that this decree

is in harmony with the said opinion filed as aforesaid; the District Court of Polk County, Iowa, the Hon. Lawrence De Graff, one of the judges thereof presiding, therefore finds and decrees as follows, to wit:

First. That the above mentioned Charles Fleming died in the city of Des Moines, Polk County, Iowa, on the 15th day of January, 1916, intestate, without issue, leaving his widow, the plaintiff herein, and his brothers, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, as his only heirs at law.

Second. That at the time of his death the said Charles Fleming was a member of a co-partnership known as Fleming Bros., of which the remaining members were the defendants, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, and that each member of said co-partnership has an equal, undivided interest in the property thereof, subject to the payment of the outstanding indebtedness.

Third. That all property both real and personal, held in the name of the co-partnership or in the names of the individual members thereof, was in fact partnership property, except household effects,

138 and except the undivided one-half interest in the southeast quarter (SE $\frac{1}{4}$) of the northeast quarter (NE $\frac{1}{4}$) and southwest quarter (SW $\frac{1}{4}$) of the northeast quarter (NE $\frac{1}{4}$) of section eight (8), township one hundred eleven (111), range forty-one (41), Lyon county, Minnesota, which was held in the name of Charles Fleming, for the co-partnership, in trust for Ada Fleming, a relative and a minor. The interest of the co-partnership in the property last described is limited to reimbursement for the sum advanced to secure the title. It is further found that the property of the co-partnership includes the insurance on the lives of the several members thereof, except the policy or policies payable to the wife of Robert J. Fleming, and does not include any property held in the name of Fleming Brothers, Incorporated, the interest of the co-partnership in that respect being represented in the ownership of the capital stock of said corporation, nor does it include any claim for a readjustment or accounting for sums drawn by either member from the funds of the co-partnership for personal or living expenses.

Fourth. That the conveyances executed by the plaintiff after the death of her husband, Charles Fleming, did not in any manner change the beneficial interest in the property conveyed and it still remains partnership property to be accounted for accordingly.

Fifth. That the estate of Charles Fleming, deceased, consists of one-fourth of the residue of the aforesaid co-partnership property after the payment of all of the indebtedness of the co-partnership existing at the time of the death of said Charles Fleming, and after deducting one-fourth of the reasonable expenses of disposing of sufficient of the property to pay the said indebtedness.

139 Sixth. That Robert J. Fleming, John A. Fleming, and Stanhope Fleming as surviving members of said co-partnership have the right, and it is their duty in the law to wind up the affairs thereof.

Seventh. That the defendants, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, continuing to operate as "Fleming Bros.," since the death of Charles Fleming have been and are delivering to plaintiff, weekly checks of forty-five dollars (\$45) being exactly the same amount as she had received during the last eight or ten years before the death of her husband, Charles Fleming.

It is therefore ordered, adjudged and decreed, that the defendants, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, proceed with reasonable dispatch to sell and dispose of sufficient of the aforesaid co-partnership property to pay all of the indebtedness thereof and to pay the same, together with the expense incident thereto, including fair compensation for their services, and thereupon transfer and deliver to the administrator of the estate of Charles Fleming deceased, one-fourth of the residue of said property to be distributed by him according to law.

It is further ordered, adjudged and decreed, that the costs of this proceeding, amounting to — dollars (\$—), be taxed to the defendants, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, and judgment is hereby rendered against them and each of them therefor.

140 To all of which the defendants except,

Lawrence De Graff, Judge. O. K. as to form. Parker, Parrish & Miller, Albert B. Cummins, Attorneys for Defendants. Parsons & Mills, Attorneys for Plaintiff.

APPEAL

Thereafter, on the 31st day of October, A. D. 1917, the defendants in said cause namely, Robert A. Fleming, John A. Fleming, Stanhope Fleming, Fleming Bros., and John A. Fleming, administrator of the estate of Charles Fleming, deceased, appealed from the decree and judgment of the District Court of Polk County, as aforesaid to the Supreme Court of Iowa by serving upon the plaintiff and her attorneys of record, and upon A. E. Mahan, the clerk of the said district court, their

NOTICE OF APPEAL

and by securing to the clerk his costs of a transcript in manner and form as required by law, and the said notice of appeal and proof of service thereon was on the 31st day of October, 1917, duly filed in the office of the clerk of the District Court of Polk county, Iowa.

141 APPELLEE'S AMENDMENT TO ABSTRACT

[Filed April 1, 1918]

(Portions Stipulated to be Deemed Material)

142 There was on the 14th day of April, 1917, filed by the Hon. Charles A. Dudley, a written opinion in this cause as follows:

OPINION

Charles Fleming died January 15, 1916, without issue, leaving surviving the plaintiff, his widow and three brothers, Robert, John A. and Stanhope.

At the commencement of this case it was supposed said decedent died intestate, but during the trial a will was discovered, produced and is now pending for admission to probate. At present the will is immaterial and may or may not become of importance to the parties in interest.

Plaintiff and deceased were married January 2, 1881, and lived together continuously as husband and wife until his decease.

In her bill the plaintiff alleges that her husband and his surviving brothers, defendants, had all of their business lives been associated together in business as a partnership, had accumulated much property, personal and real, in equal proportions and that her husband died seized of an undivided one-fourth of all the partnership property, subject only to a proportionate liability for the partnership debts.

That her husband carried life insurance in the amount of \$58,000 which the defendants have collected and converted to their own use.

That the Fleming Brothers owned a corporation known as the "Fleming Brothers, Incorporated," in which the stock of 143-145 \$100,000 was equally divided, one-fourth of which stood in the name of the deceased, Charles Fleming.

That certain real estate stood in the name of her husband Charles Fleming at the time of his decease, but is now claimed by the three surviving brothers.

In the charging part of her bill the plaintiff alleges that the surviving brothers of her husband and John A. Fleming, as administrator of the estate of Charles Fleming, deceased, claim, (saving and excepting the household goods estimated in value at about \$500) that all the balance of the property of said decedent belongs to the surviving brothers under and by virtue of the terms of three certain contracts in writing in words and figures and order of execution as follows:

(The Trial Judge, Hon. Charles A. Dudley, here sets out in *hæc verba* the three contracts between Robert J., John A., Charles and Stanhope Fleming, identically as they appear in plaintiff's petition and in the opinion of the Supreme Court of Iowa as herein quoted from Vol. 174 Northwestern Reporter p. 946 et seq.)

146 But as to these contracts, the plaintiff alleges that in so far as they affect her rights as the surviving widow of her deceased husband, they are null and void for two reasons:

1. They are without consideration and are contrary to public policy.

2. They operate as a fraud upon the plaintiff and her rights as the widow of the deceased.

The plaintiff further alleges that the above contracts are testamentary in character and purport to accomplish in themselves what cannot be accomplished by will under the statutes of Iowa.

Plaintiff claims that she is entitled to the distributive share of the property of her deceased husband as provided by the statute of Iowa, to wit: a reasonable amount for her support for the period of one year from the death of her husband, seventy-five hundred dollars and one-half of the remainder of her deceased husband's estate. The above is plaintiff's claim upon the theory that her husband died intestate.

The defendants claim that they own jointly as surviving joint tenants all of the property in which their deceased brother Charles Fleming had an interest during his lifetime, his household effects alone excepted.

They deny that they were associated as a partnership that they owned all of their property in equal proportions, and that their brother Charles died seized of an undivided one-fourth interest in any property or in any partnership property or in any property owned by Fleming Bros.

As to the life insurance upon the life of said Charles Fleming, defendants allege that a joint tenancy composed of themselves and

147 Charles Fleming during his lifetime, at the joint expense of said joint tenants, carried a considerable amount of life in-

surance upon the life of each of the said four joint tenants and that each and every policy of insurance upon the life of each and every of the said four joint tenants was payable to the other members of said joint tenancy, save and except policy 741,051 issued upon the life of Robert J. Fleming, payable to his wife Emma D. Fleming, and that as such joint tenants they carried and collected life insurance to the gross amount of \$55,482.16 upon the life of Charles Fleming under policies each and every of which were payable to Robert J. Fleming, John A. Fleming and Stanhope Fleming or to the survivor of them, of which life insurance \$18,474.87 was deducted therefrom and applied by the insurance company issuing said policies in payment of loans which had theretofore been obtained and which were outstanding upon said policies, and that the balance of \$37,007.39 was by the beneficiaries paid to the Mutual Life Insurance Co. of New York on loans made by said company on policies upon the lives of these defendants.

The creation of the corporation "Fleming Brothers, Incorporated" having a capital stock of \$100,000 is admitted, but they aver that the stock was not divided, except nominally, and that pursuant to the contracts above set out, certificates aggregating twenty-five hundred shares were issued by said corporation in the name of each of the four brothers, but to them as joint owners and tenants.

That upon the issue of said stock, each brother as a joint tenant, forthwith endorsed the certificates and deposited same in a common receptacle to which each brother had access all the time, and said stock is owned jointly by Fleming Bros. as joint tenants and by the survivors or survivor of them.

148 As to the real estate standing in the name of deceased at the time of his death, it is averred that it was at all times the property of Fleming Bros. with the incident of survivorship as between them; that the same was acquired with joint funds and held for the joint benefit of said joint tenants and the survivors or survivor of them.

They further aver:

"That on or about the 11th day of April, 1916, the plaintiff Anna B. Fleming with full knowledge of all the facts and of the title and interest claimed by these defendants, ratified and confirmed the contracts referred to and set out in her petition by executing and delivering to these defendants quit-claim deeds conveying to them as joint tenants and to the survivors and survivor of them any and all interest which she apparently had in real estate as the surviving widow of Charles Fleming, deceased."

That by reason of the fact that Charles Fleming had only the interest of a joint tenant, Charles Fleming did not die seized of any real estate, and consequently the plaintiff was not entitled to any dower or distributive interest therein as the widow of Charles Fleming, deceased.

The defendants admit the execution of the contracts, and aver that they are valid and binding in all respects upon the plaintiff and inure to their benefit as the surviving joint tenants of the deceased, and deny that their brother Charles Fleming died seized or possessed of any estate in any property whatsoever except household effects, and deny that their said brother either during his lifetime or at his death either owned or was possessed of or entitled to any estate of inheritance or any estate in which the plaintiff was, is, or could be

149 entitled to a dower or distributive share or interest of any sort.

The plaintiff replies denying ratification and confirmation and averring that her signature to certain instruments made by her shortly after the decease of her husband was obtained by duress, and she prays to have them cancelled.

The foregoing statement presents substantially the facts and claims of the parties, and therefrom the question to be determined is readily seen to be: What is the property interest or estate, if any, Charles Fleming had in the property of the so-called partnership "Fleming Brothers" at the time of his decease?

The essential and controlling facts to be considered at this time are not in dispute. It appears that since the date of the first agreement, December 14, 1896, continuously to the decease of Charles Fleming, he and his three brothers have been "mutually associated" "jointly engaged" and "associated together" in the prosecution of a Life Insurance business which has furnished "profits, earnings and income," to the production of which each has contributed his personal service, under written agreements subsisting between the four brothers, who were engaged in carrying on a business in common with a view of profit.

Each brother or member of the partnership, Fleming Brothers from time to time appropriated or drew from the joint fund for his own use such sum as he saw fit, but no accounting has ever been required therefor by the remaining partners, by virtue of a stipulation in the first and second agreements to the effect "that at no time shall any accounting be made or required to be made by any party hereto (the agreement), his representatives, executor, heirs, 150 or survivors" and in the last agreement that what "a decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein." In other words, whatever the appropriation of the joint fund by one brother he did not become a debtor either to the firm or to any member of it on account of such appropriation.

If the court were required to construe the agreement as to the amount of the joint property which each brother could in fact appropriate to his separate uses, or as to the amount which a creditor of one of the brothers could seize without the consent of the other brothers, it considering the business and the contribution of capital by each party to the contract, would have to give it both an equitable and reasonable construction, for it cannot well be insisted that one to the exclusion of the others could appropriate to his own use or suffer to be appropriated or seized at the instance of a creditor of one of the brothers more than one-fourth of the joint fund or estate.

At the death of Charles Fleming a large joint property had accumulated, held and owned by the brothers in excess of appropriations by the several members of the firm, but so limited had been the appropriation by the deceased of the joint property that he had no estate as appears by the inventory of his administrator save and except his household effects, about \$500 in value, set apart to his widow, plaintiff in this case, if the contention of the defendants is correct as to the effect of his three agreements.

Who owned this property accumulated by the four brothers at the death of Charles Fleming?

We have to consider a contractual relation disclosed by three separate agreements, serials in point of time, the declared 151 purpose of which is, "to fix and determine the interests of each therein" in the business in which the parties were jointly engaged, the extent of which interest as stated in the last agreement is "what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein," and in the prior agreement, "only such share of and interest in the profits, earnings and income of the business of Life Insurance in which we are or shall be jointly engaged as shall be actually received by each or paid upon the order of each with the consent of the others from the income of said business."

In further assurance to each other and to third persons of the limitation upon interest in the profits, earnings and income of the business, they stipulate that upon the death or withdrawal of any party to the agreements "his interest in the business shall cease" and that no accounting shall be required by any person whomsoever,

and that "any sum of money paid to or for any party hereto shall be in full of the interest of said party in said business."

The only capital contributed to the business of Life Insurance is "labor performed" and that has been of such character and amount as to result in a large accumulation of property owned by the partnership composed of the four brothers at the decease of the brother, Charles Fleming.

About six weeks after the date of the first agreement, a second agreement was made between the brothers, intended solely to remove some doubts which had arisen as to whether the first covered inter-

ests in the renewals of policies of insurance due or to become 152 due since January, 1893, and because of that doubt they were included in the second agreement. In legal effect the second agreement is the same as the first, but the following is quoted therefrom, to wit:

"In view of our past association in, and the manner of the conduct of our business without the usual and ordinary incidents of a partnership, and to more effectually define and determine our individual interests in said business in the future as between ourselves and in relation to all other persons and to provide for the future uninterrupted prosecution of said business," etc.

The business of life insurance continued and was prosecuted uninterruptedly by the brothers, when later, January 17, 1911, a third agreement was made by and between them, wherein the second clause restates the limitation of the property interests of a deceasing brother in the property then owned and thereafter in the further prosecution of their business, acquired by the partnership.

At the date of the last agreement a part of the property owned by the brothers was the stock in the corporation "Fleming Bros., Incorporated" of which "each of the undersigned (the undersigned being the four Fleming Brothers) is the owner of one-fourth," as stated in the contract. The brothers at this time carried insurance, accident and life, upon their respective lives, the policy on the life of each brother payable to his three brothers, "the premiums of which have been paid by the partnership and the partnership is entitled to the proceeds of all such insurance except a policy payable to Emma D. Fleming," as further stated in the agreement.

153 This third contract was prepared and made with reference to the conditions of the parties thereto and their property as of its date and as to property to be "hereafter acquired."

Considering the terms of the agreements, it is clear they were made with an intent to establish a joint ownership of the property acquired by the brothers, with the right of survivorship, upon the death of a brother, in the surviving brothers or brother. Such intent and purpose appear in each contract, but whatever the intent and purpose of the first two agreements, the last agreement is determinative of the rights of the parties involved, inasmuch as that agreement is the one in force at the death of Charles Fleming and states the present working and holding agreement of the partnership; therefore upon the

construction of that agreement must the rights and interests of the parties be determined.

The thought of an existing partnership in law is expressed in the first clause of the agreement, to wit:

"That the partnership between the undersigned is with the express and distinct understanding and agreement that all the property heretofore acquired by the undersigned has been acquired as the results of the said partnership and that said property belongs to the said partnership, including all proceeds of said insurance business with the renewals to which the parties hereto may be entitled thereon."

In the second clause of the contract it is stated, that, "upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners," and again it is said, "surviving 154 brothers of the said partnership", and "withdrawn from said partnership" and further and finally in speaking of the premiums on insurance on the life of each brother it is said, "have been paid by the said partnership and the said partnership is entitled to the proceeds of all such insurance except the policy" upon the life of one of the brothers payable to his wife "which is not a part of said partnership property."

The phraseology of the last agreement indicates that in the mind of its author, notwithstanding the terms of the former agreements the business of the Fleming Bros. as conducted, come under the first two agreements, had been in fact and was in law that of a partnership.

In the absence of an agreement as to the interest of each brother, partner in the partnership, in the property of the partnership the law presumes it to be equal and upon that presumption, if not as the result of agreement, in one of the whereases of the last agreement it is stated that each brother is the owner of one-fourth of the stock of the corporation known as "Fleming Bros., Incorporated."

The frequent use of the word "partnership" in the last agreement does not determine that in fact one existed between the brothers, but it does suggest that the author of that contract concluded that the legal intention of the parties would control, and consequently in legal contemplation there existed in fact a partnership. On this point Cooley, J. in Beecher v. Bush, 45 Mich., 188 said, "It is nevertheless, possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else or that they even expressly declare that they are not to be partners. 155 The law must declare what is the legal import of their agreements and names go for nothing when the substance of the arrangement shows them to be inapplicable."

The agreements under consideration show conclusively that the four brothers who signed them contributed their respective services and skill equally to the joint business provided for and carried on under the three agreements, for their common benefit and that they

owned and shared the profits thereof to the extent of the demand of each brother. The circumstance that upon the death of one of the brothers, the decedent's share in the profits is limited "to what he has theretofore drawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein" establishes beyond controversy that such brother owned and shared in the profits of the business. The undisputed evidence shows that each brother appropriated to his own use without restriction whatever he desired of the joint fund or property without in any manner becoming debtor therefor to any one whomsoever.

Such unlimited right can only be recognized and justified upon the conclusion that each brother had no interest in the common or joint fund which he could have and enjoy at his pleasure as the owner thereof.

With a right to appropriate so unrestricted, an individual creditor of one of the brothers could secure payment of his unpaid demand from the joint fund not by reason of the liability of the other brothers therefor but by virtue of the interest or estate our brother had in the partnership property, subject of course to the priority of partnership creditors.

156 Instead, therefore, of conducting "a business without the usual and ordinary incidents of a partnership" they have mutually created and mutually conducted a business between themselves and by themselves for profit as principals therein for their own profit with every usual and ordinary incident of a partnership. This conclusion is sustained by the terms of the last agreement.

The three agreements are silent as to sharing losses if they, instead of profits, should attend the conduct of the business by the brothers under the agreements.

In Iowa, speaking of the essential characteristics of a partnership between the associates in the common enterprise, the Supreme Court has said, in order to constitute a partnership *inter se* there must be a sharing in the losses as well as in the profits.

This state is therefore committed to the rule that in partnership there must be a community of loss as well as a community of interest. It is not, however, necessary that the agreement of the parties should contain an express provision that each partner or associate should share losses. An obligation to share losses may be inferred from the agreements and from the relation of the parties to the business to be transacted.

In the instant case the original contribution of capital was the equal service of each partner to the business to be done by the partnership, and to which business there has been given by each equal and undivided service and attention. There has been equal authority in the management, control and conduct of the business, and equal interest in, right to and ownership of the property of the partnership, and an equal right and power in disposition of it, even though individual appropriation of the firm property has been unequal, but because of that fact neither brother has become a debtor to the firm or any member of it.

The last agreement states "that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein" but such covenant in no sense restricts the rights and powers of each co-partner as a member of the co-partnership while living. The inference is therefore a reasonable one that each partner was to share losses, if any, equally.

It is claimed that the property held and owned by the parties is a unit owned by four parties, or that there is a legal entity owning this property separate and apart from the persons composing it, but from a legal standpoint this is true only in a limited sense. For most purposes the law regards only the individuals who occupy the partnership relation, though in this state for the special purposes of taxation and process against a partnership, a partnership is regarded as a distinct entity. In recent cases, however, where the partnership is spoken of as having its own property, its own creditors, it means that the partners as such have special rights and liabilities which are worked out through their partnership relation. The brothers are the owners of the property acquired, subject only to the right of creditors, in a relationship of mutual agency in a business conducted by them for their mutual benefit and profit.

In conclusion I find that this was a partnership between the brothers, and the property owned by the partnership at the death of Charles Fleming was acquired by partnership funds and is to be treated with the usual incidents of partnership property in 158 which each partner is entitled to an undivided one-fourth, unless, as claimed, the property of the partnership upon the death of one of the partners became that of the surviving brothers, and if it did the estate of the deceased had no interest therein.

II.

And this comes to the second question in the case. By virtue of the last agreement between the brothers was the property or interest of Charles Fleming in the partnership of Fleming Bros. disposed of so that upon his death his estate had no interest therein or any right thereto?

The last agreement in its preamble states five "Whereas" each implying recognition of facts, as follows:

"Whereas, the undersigned, Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming are engaged in the life insurance business in the States of Iowa, Nebraska and Wyoming under a contract with the Massachusetts Mutual Life Insurance Company; and

"Whereas, each of the undersigned is the owner of one-fourth of the stock of a corporation organized under the laws of the state of Iowa known as Fleming Brothers, Incorporated; and

"Whereas, the undersigned also are the owners of certain real estate and other property in which each of them is interested; and

"Whereas, the undersigned expect to acquire additional property hereafter; and

"Whereas, the said property now held and owned by the undersigned has been acquired by them with the understanding that it shall be disposed of as hereinafter set out."

159 The last but one of the above refers to property to be acquired in the future and the last to property then "held and owned" and further states an imperative obligation as to this property to be performed in the future, to wit: "shall be disposed of as hereinafter set out." The time and occasion for the disposition of property "hereinafter set out" is found in Article 2 as follows:

"That upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners which embraces said stock in Fleming Brothers, Incorporated, shall be and become the property of the surviving brothers of the said partnership, and that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein, and the sole and entire interest of his estate therein."

All the property held and owned by the Fleming Bros. was acquired by the four brothers engaged in carrying on a business in common with a view to joint profit and was therefore partnership property in which each brother had the interest of a partner, and for want of an agreement to the contrary had an equal and undivided one-fourth. The extent of that individual interest is determined by the residue of the property after firm debts are paid. Each partner continued in the association with equal voice and control in the management of the business and equal right to appropriate the joint fund for his personal use up to the date of his death. He held and enjoyed his interest in the joint property without limitation or restriction as long as he lived. These rights and interests terminated only "upon the death of either one of the undersigned."

Whatever title and interest Charles Fleming had in the property held and owned by the four brothers did not pass from him till death. As a means of divesting title the last agreement is not effected until the death of Charles Fleming.

The agreement did not by its terms operate as a conveyance in presenti but as a conveyance only upon the death of one of the brothers. The instrument itself and the acts of the parties under the instrument do not reveal an intent to convey an estate or interest that should vest immediately, but on the contrary, one that should pass only upon death.

The statute (See. 3362) refers to the property of deceased not necessary for the payment of debts, "nor otherwise disposed of" and if the agreement in question did not dispose of the property of Charles Fleming before his decease he died holding and owning it, and if he died intestate his interest therein is to be distributed to the same persons and in the same proportions as though it were real estate, but if he died testate, as directed by his last will and testament.

If the conclusion is correct that the association styled Fleming Bros. is a partnership with the usual and ordinary incidents of a partnership, then upon the death of Charles Fleming the partnership was dissolved, the legal title to all the partnership property passing to the surviving partners in trust, however, to apply the assets to the payment of debts, close upon the business with reasonable promptness and to account to the legal representatives of the deceased

partner for his share of the final balance.

161 I conclude and hold that under the agreements, of which the last is the one under which the property is held that the decedent had an interest in the property of Fleming Bros. not disposed of prior to his decease, but disposed of his death under the agreement, which disposition is testamentary in character but void for that purpose.

But for another reason the contention of the defendants cannot be sustained.

Our statute (Sec. 2923) provides that conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed, but when it was before our Supreme Court (Hoffman v. Stigers, 28 Iowa, 302) for construction where a conveyance had been made to a husband and wife and it was contended that as at common law the husband and wife were one person in law they took as tenants by entirety, therefore upon the death of the husband the wife had the right of survivorship and took in entirety, the court, Wright, J., said:

"With us, therefore, when the estate is held by two or more, not as trustees, but in their own right, nothing being expressed to the contrary, the tenancy would be in common. And thus most plainly and authoritatively is the estate of joint tenancy disfavored by our law. There is no reason, no necessity, for such an estate, except under the most peculiar circumstances. In the language of the old Massachusetts statute (1785, ch. 62) tenancies in common are "more beneficial to the commonwealth and consonant with the genius of republics. "And as now we in most of the states condemn entailments, or perpetuities, so we do and should joint tenancies, or at least their common-law incident—the right of survivorship."

162 The intent to create a joint tenancy was not expressed and the incident of a joint tenancy, the right of survivorship, was denied.

Notwithstanding the early condemnation of joint tenancy in this state, that such an estate may exist here must be conceded, but the concession does not go to the extent of sustaining such estates when the creation of them is forbidden by or is inconsistent with the laws of this state.

The intent of the parties to the instruments set out above is clearly to create an estate with the incident of survivorship which in effect deprives the widow of her marital rights.

An examination of the agreements discloses an intent to bar the widow of any deceasing brother, and children as well, if any, of any interest whatever in the estate accumulated by the decedent during

marriage and held and enjoyed by him without restriction until death. Such dispositions of property are condemned in this state because they are "not consonant with the genius of republics." They are fraud upon the marital rights of the surviving spouse. The fact that a wife is without an inchoate right in the personal estate of her husband and that it may be submitted to the perils and vicissitudes of business and be wholly lost thereby and she is powerless to prevent such a disposition of property does not sanction a disposition of property as a bar, for if not inconsistent with any law of this state, it runs counter to her public policy which forbids the creation of like or similar entities as the owner of property with the incident of survivorship thereby affording a ready and convenient instrumentality to dispose of personal property and leave surviving spouses and children dependents who otherwise might be, and if might be could be, independents.

It is conceded in argument.

"that a contract which is made for the purpose of defeating the dower rights or distributive share of a wife who becomes a widow is void, not because of any particular sacredness in the subject as defined in the statutes providing for such a distributive share, but because the purpose sought to be affected is or may be a fraudulent one. If the paramount purpose of the contract is to defeat dower or distributive share, this would be evidence of fraud. But in the case at bar, the purposes of the contracts was to establish the working basis upon which these brothers should conduct their business. Under these agreements they worked and prospered for twenty years. Charles Fleming and his wife might today, under the hand of Providence, be the absolute owners of all of the product of the labors for the four brothers. The effect of the contracts upon the status of the plaintiff is purely incidental. It was not the provision or purpose of the contracts to create that status to the detriment of the plaintiff, nor to the detriment of the wife and descendants of any one of the four brothers."

This argument ignores the paramount purpose of the agreements, which is, as is seen by a reading of them, not only to provide a working basis upon which the brothers should conduct their business, but to provide for the transmission of the interest of each brother in the business and contrary to the holding of property in common, attach thereto the interest of survivorship, thereby with intent limit the interest of each brother to what he had withdrawn during his lifetime, and consequently deprive a surviving spouse of any share in the accumulated property; otherwise why create a joint tenancy with the incident of survivorship? The status of the plaintiff as the widow of Charles Fleming if "purely incidental" is the incident of a prearranged plan which deprives her of her share in the estate of a deceased husband and as it is to her detriment is in law a fraud upon her marital rights.

It is to be said, however, that the defendants observing the right of the plaintiff to be treated as one of the family have weekly, notwithstanding the contention of plaintiff, mailed to her a check in

exactly the same amount as she had received during the last eight or ten years before the death of her husband.

A parallel case is not by the diligence of counsel found, and I do not deem it necessary to review in this opinion the many citations appearing in the full and very able briefs of counsel for the respective parties.

I have said that the essential and controlling facts are not in dispute. One branch of the case has called forth very conflicting testimony, that pertaining to the execution of some instruments a few days after the death of Charles Fleming. The rights of the parties are not, in my opinion, affected by those contracts and conveyances for the simple and persuasive reason that it was not the intention to divest thereby the plaintiff of any interest in the estate of her husband if she had any.

As the pleadings and proofs now stand the plaintiff is entitled to a decree as prayed, and it is so ordered, with exception to the defendants.

Chas. A. Dudley, Judge.

[Filed September 4th, 1918]

(Portions Stipulated to be Deemed Material.)

Propositions and Authorities Relied on for Reversal

Proposition I

The controlling factor in this case is the validity of the Fleming family compact which has existed for over forty years and which is formally expressed in the written contracts, exhibits 101, 102, and 103.

(a) The court should give effect to contracts rather than to nullify and declare them void.

(b) Courts should find out and give effect to the true intention of the parties in construing their contracts.

(c) Unless such true intention is violative of positive law or sound morals, the contracts should be upheld.

(d) The validity of the contracts and the true intention of the parties to them should be viewed and determined in the light of the practical construction placed upon them by the parties and of their acts and practices under and pursuant to them.

(e) As the three contracts are in *pari materia* they should be construed together and effect given to the provisions of each and all of them, since they are not in conflict with each other.

See authorities hereinafter cited.

Proposition II

While the Fleming brothers, Robert, Charles, John A., and Stanhope, were doubtless as to outside dealing with them, a part

166 nership, nevertheless, the contracts in controversy recognize as existing and expressly provide for a joint tenancy with survivorship and exemption from accounting; and these express provisions are expressly made binding upon the heirs, survivors, executors, and administrators of each of the four brothers.

(a) Joint tenancies with the incident of survivorship when expressly contracted for, are recognized and upheld by the law of the state of Iowa and the contracts in controversy are valid in that respect. Code, section 2923;

Wood v. Logue, 167 Iowa, 436; 149 N. W. 613;

Baker v. Syfritt, 147 Iowa, 49, 62;

23 Cyc., p. 483 § b;

23 Cyc., 484, et seq. under the following headings:

2. Distinction between joint tenants and tenants in common.—p. 484;
3. Who may be joint tenants.—p. 484;
5. Essentials to joint tenancy.—p. 484;
9. Survivorship.—p. 488;
- E. Devises.—p. 495.

(b) The estate of one of several joint tenants in the joint property is not an estate inheritance.

23 Cyc., 495 § E—Devises;

Wood v. Logue, 167 Iowa, 436; 149 N. W. 613;

See authorities above cited.

Proposition III

Dower cannot attach to the estate of a joint tenant where, as in this case, his estate remains joint until his death, because his estate is not an estate of inheritance. Since Charles Fleming was survived by his joint tenants, Robert, John A., and Stanhope, he 167 neither possessed in his lifetime nor died seized of any estate to which a dower interest in plaintiff could attach or in which a dower interest could inhere. He merely departed from the estate at his death.

Code, section 3366;

14 Cyc., p. 891 Dower. 1 and 2.

14 Cyc., pp. 895, 896 "9. Joint seizin."

14 Cyc., pp. 901, 902. "Estates and interests—1. Estates of inheritance." "Estates in common or joint tenancies."

See authorities in support of Proposition II.

Proposition IV

There is no "public policy" of the state of Iowa either additional or superior to our statutory provisions prescribing the creation, existence, or preservation of dower interest of a surviving widow. Dower in this state is statutory only. Our statutory enactments contain the whole law on the subject. Our "public policy" is expressed in these statutes: outside of the statutes it has no existence.

Code Sections 3366, 3362;

U. S. v. Freight Ass'n, 166 U. S. 290, 340;
 Logan & Bryan v. Postal Tel. Co., 157 Fed. 570, 587;
 C. R. & St. P. Ry. Co. v. Spafford, 41 Iowa, 292;
 People v. Hawkins, 51 N. E. 257, 260; 42 L. R. A. 490; 68
 Am. St. Rep. 736;
 Hartford Fire Ins. Co. v. Ry. Co., 70 Fed. 201; 175 U. S. 91;
 Swann v. Swann, 21 Fed. 299, 301;
 Vidal v. Girard's Ex'rs, 43 U. S. 127 (2 How.);
 Spead v. Tomlinson, 73 N. H. 46; 59 Atl. 376, 397; 68 L.
 R. A. 432;
 Couch v. Hutchinson, 2 Ala. App. 444; 57 So. 75, 76;
 People, ex rel. v. Shedd, 89 N. E. 332, 334; 241 Ill. 155;
 168 Harding v. American Glucose Co., 55 N. E. 577, 599; 182
 Ill. 551, 616; 64 L. R. A. 738; 74 Am. St. Rep. 189;
 Perry v. Furniture Co., 83 N. E. 444, 447; 232 Ill. 101;
 Borgnis v. Falk Co., 133 N. W. 209, 216; 147 Wis. 327; 37
 L. R. A. (N. S.) 489;
 Bigelow v. Old Dominion Copper Co., 71 Atl. 153, 174; 74
 N. J. E. 457;
 Edgerton v. Brownlow, 4 H. L. Cas. 122, 123;
 Kuhn v. Kuhn, 125 Iowa, 449, 453;
 McAlister v. Fair, 84 Pae. 112, 114; 72 Ks. 533; 3 L. R. A.
 (N. S.) 726; 115 Am. St. Rep. 233;
 State v. Coyle, 122 Pae. 243, 254; 7 Okla. Cr. 50.

The following cases decided by this court hold that common law
 dower does not exist at all in the state of Iowa; that the whole sub-
 ject is statutory.

Purell v. Lang, 97 Iowa, 610;
 Ditson v. Ditson, 85 Iowa, 276;
 Kendall v. Kendall, 42 Iowa, 464;
 Mock v. Watson, 41 Iowa, 241.

History of dower legislation in Iowa.

1 Scribner on Dower, p. 54, et seq.

Proposition V

A. The contracts entered into by the four Fleming brothers, Robert J., John A., Charles, and Stanhope, recognized as existing and of their own force were sufficient to create and vest in each instanter a joint tenancy with survivorship and exemption from accounting as to all property of every nature whenever acquired by the four brothers or any of them.

B. Since the said contracts recognized as existing and also 169 expressly provided for a present vested joint estate, they are not testamentary in character and are valid and binding upon all whom they affect, the plaintiff included.

McKinnon v. McKinnon, 57 Fed. 409. Opinion by Thayer,
 J., concurred in by Caldwell and Sanborn, JJ.
 Wood v. Logue, 167 Iowa, 436;

Vosberg v. Mallory, 155 Iowa, 165;
 Haulman v. Haulman., 164 Iowa, 471;
 Larimer v. Beardsley, 130 Iowa, 706;
 Smith v. Douglas County, 254 Fed. Rep. 244.

Proposition VI

Upon reasons (stronger if possible than the foregoing which apply particularly to real estate), it appears that Charles Fleming left no personal estate in which the plaintiff was entitled to share as his surviving widow.

Code, section 3362;
 Vosberg v. Mallory, 155 Iowa, 165;
 Lunning v. Lunning (Iowa), 168 N. W. 140;
 Metler v. Metler's Admrs., 19 N. J. E. 457;
 Haulman v. Haulman, 164 Iowa, 471.

(a) The property of Fleming brothers in the agency contract with the Massachusetts Life Insurance Company was essentially a joint tenancy and by its own terms, as well as by the terms of the contracts in controversy, inured to the benefits of the survivors and not to the estate of Charles Fleming.

(b) The stock in Fleming Brothers, Incorporated, was of course personal property and the plaintiff had no inchoate dower interest therein.

(c) When the certificates of stock in Fleming Brothers, Incorporated, were issued to Charles Fleming, they became at once 170 without any formalities of transfer a part of the joint estate of Fleming Bros., because of and in pursuance to the provisions of the contracts.

(d) The act of Charles Fleming, assigning said certificates in blank and depositing them so endorsed in the common depositary along with the stock issued to and similarly endorsed by the other brothers and to which depositary all of the brothers had access, constituted a performance of and compliance with the contracts (particularly that of January 17, 1911), and instanter effectually vested the ownership of said stock in the four brothers as joint tenants.

(e) Independent of said contracts the assignment of said stock in blank and the deposit thereof in said common or joint depositary constituted an effectual assignment instanter, of his individual stock by Charles Fleming to his surviving brothers and vested the property in said stock in them jointly pursuant to their original joint arrangement.

(f) Independent of the written contracts including particularly that of January 17, 1911, and independent of any other express contract, the assignment of said stock in blank and the deposit thereof in the common depositary accessible to his surviving brothers by Charles Fleming was good as a gift inter vivos.

(g) Whichever of the foregoing views of the transaction be adopted, the 2,500 shares of stock in Fleming Brothers, Incorporated,

issued to Charles Fleming, endorsed in blank by him and deposited by him as aforesaid, were effectually cut off from his personal estate and the plaintiff can neither have nor effectually claim any dower or distributive interest therein.

McKinnon v. McKinnon, 57 Fed. 409;
Wood v. Logue, 167 Iowa, 436; 149 N. W. 613.

171 & 172 As to formalities involved in transfer of stock.

Cook on Corporation, 7th Ed., Vol. 2, p. 1152, §§ 373, 374;
Tucker v. Tucker, 138 Iowa, 344;
Pyle v. East, 173 Iowa, 165; 155 N. W. 283;
Larimer v. Beardsley, 130 Iowa, 706;
Candee v. Conn. Sav. Bank, 71 Atl. 551;
Dickerson's Appeal (Pa.), 8 Atl. 64.
Reese v. Philadelphia Trust, Sav. Etc. Co., 67 Atl., 124;
Gilkerson v. Third Ave. R. Co., 63 N. Y. S. 792, affirming
opinion by referee, Roger A. Pryor.

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Proposition IX

The opinion and decree of the trial court seem to be bottomed upon the thought that the contracts in controversy are void as being against public policy. In reaching this conclusion the trial court has disregarded the rule that contracts will not be declared void as against public policy except in cases free from doubt.

Richmond v. Ry. Co., 26 Iowa, 191, 202;
Barrett v. Carden, 65 Vt. 431; 26 Atl. 530; 36 Am. St. Rep. 876;
Livingston v. Ry. Co., 142 Iowa, 404, 408, 410;
Baldwin & Co. v. Moser, 123 N. W. 989;
Cole v. Brown-Hurley Co., 139 Iowa, 487.

Proposition X

Contracts are to be construed as legal rather than void.

Alfree v. Gates, 82 Iowa, 19, 22;
Maxwell v. McCall, 145 Iowa, 687;
Wis. Lbr. Co. v. Tel. Co., 127 Iowa, 350;
Cole v. Brown-Hurley Hwde. Co., 139 Iowa, 487.

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Proposition XI.

A contract will be enforced as the parties have written it.

Rapp v. Linebarger, 149 Iowa, 429, 439;
Streator Clay Mfg. Co. v. Henning Vineyard Co., 176 Iowa,
297;
Peterson v. Brotherhood, 125 Iowa, 562.

BRIEF AND ARGUMENT FOR APPELLEE

[Filed December 3rd, 1918.]

(Portions Stipulated to be Deemed Material.)

176 This case presents questions that are absolutely new in the State of Iowa, and is a case that we have been unable, after searching the indices of all of the law reports of the English speaking countries, to find a case on all fours therewith so it will be safe to say that it presents questions that have never yet been passed on by the courts of last resort of any tribunal administering the common law. We do not mean to say that here and there scattered thru the case are not propositions that arise that have not been passed upon, but we do mean to say that the case as it stands, presents a combination of facts never before presented to any of the courts of last resort in the English speaking world.

Counsel in argument has amply presented, it seems to us, every possible phase that would lead to a different conclusion than that reached by the court below. Many of them far-fetched; many of them perfectly logical but based on facts different than the facts here. He has undertaken, and skillfully too, to weave a sort of glamor about the case by talking about family compacts and the relations that existed between the Fleming Brothers and the other members of the family and that the contracts in question herein are simply an out-growth of those former relations and written evidences of it and to read the argument without a knowledge of the facts lying back of it and to take the view, that counsel undertakes to impress, we would be led into the erroneous conclusion that this family—like the various Royal families in Europe—has family statutes, customs or traditions which sets it apart from the common herd and make it a law unto itself and excuses it for undertaking to carry out, with the aid of skillful lawyers, a scheme contrary to the general public policies of this state.

177 We see nothing remarkable in this family history that is disclosed by the testimony prior to the making of the so-called compacts or contracts that were drawn by Judge Lenahan of Dubuque, and they were subsequently substituted by the one drawn by Mr. N. T. Guernsey of Des Moines, Iowa. The record presents a history of a very ordinary family in very moderate—we might say—straitened circumstances. The elder Fleming, the immediate progenitor of the four brothers involved in this action located somewhere in Michigan and purchased a mill and troubled along, we are justified in the presumption, heavily in debt and we find that after his death thru the debts of the estate the family lost all the property it had. We find that at the death of the father, the eldest son, Robert, one of the defendants herein, was not yet 22 years of age; that Charles, the deceased, whose widow is now contesting for her rights as such, was then about 19 years of age and the other two were younger. It seems they all worked along and

received no wages. This is nothing remarkable for an American family; nothing remarkable for any family. That a family consisting of four boys and one girl, father and mother, should all work together under the guidance of the father and mother for the family interests and it seems to us to be going back a good ~~way~~ and indulging in a rather far-fetched conclusion—that any family compact was ever entered into or could have been entered into under such circumstances, or that it could be inferred or that the evidence would justify the inference that such was the case. Neither do we find it in anyway remarkable that the four boys, after the death of the father, struggled along with the business in Michigan

178 and under the guidance and headship of the mother under took to save what they could save out of it and that subsequently when this property left by the father, was lost, that there should be somewhat of a separation of the family each going off and seeking different occupations; that each should have an interest in the other; that they should adjust their affairs and get together and enter into some sort of a business arrangement.

Let us examine the record and see just what there is back of this imaginative, remarkable Fleming family compact. The testimony of Robert J. Fleming begins on page 241 of the Abstract and examining that we find the family lived at Coburg, Ont. September 2nd, 1856, the date of Robert's birth, and lived there for about eight years thereafter. The elder Fleming, being a miller by trade, afterwards removed to Williamston, Mich. with his family and died in 1878 leaving the property, consisting of the grist or flour mill, saw mill and about 80 acres of land adjoining owned by the elder Fleming and a Mr. Mead—presumably in partnership with Mr. Fleming in the conduct of the business—and we find that the business was subsequently conducted under the name of Geo. G. Mead, survivor for himself, and Stanhope Fleming. The death of the father left the family consisting of his widow and four children; Robert then about 22 years of age; Jennie Fleming born next to Robert; Charles not yet 19 years of age; John younger and Stanhope still younger and to develop further the theory of this remarkable compact, group or family arrangement on page 212 of the Abstract, Mr. Miles asks the question as to what the arrangement was between the members of the family during that period and we find that the whole family

179 worked together and everything they had went into a common pot; everybody had the same work to do and that the business was run under the style of Geo. G. Mead, survivor, etc., until sometime in 1884 when a partnership was made, a considerable creditor named Grimes coming in and all of the Flemings taken in, except Stanhope, not yet of age; Mr. Grimes making a contract with the Flemings that they were to pay the debts that were owing him with interest thereon and if they did not do it within six years—he was to have one-half the property. The business failed in 1885 and the testimony is that all of the debts were not paid until the last few years before the trial of this case below.

Charles, who was married July 4th, 1881, he not then being of

age, and whose wife we find by reference to her testimony was then past 20 having been born November 3rd, 1860. But one child was ever born to Charles and his wife and that was November 22nd, 1882, and died the following January. (Abst, p. 38.)

Turn again to the history of the Fleming family as related by Robert and beginning at page 213 of the Abstract we find that after Grimes and Flemings failed about the middle of April, 1885, Robert—who in the meantime had been married and his wife died after two years' married life—went up to Minneapolis and worked there for some lumber firm and in the fall of the year first took up the insurance business, having been joined by John in 1886, John, being a bachelor, having no wife to keep him home. In 1887 the four brothers went into the railroad business purchasing for that purpose some teams, harness, wagons, etc. and first worked on the Great Northern R. R. North Dakota and in the fall of 1887 moved their outfit near Marshall, Minn. engaging in railroad work and when winter came made arrangements to winter their outfit at the last named town. The financial results from the railroad

180 business were not satisfactory and in February, 1888, Robert and John came to Dubuque with the Mutual Insurance Co. agency. Charles remained wintering with the railroad outfit at Marshall, Minn. and as they had decided, probably, to quit the railroad business commenced trading the horses for equities in pieces of land and getting rid of the outfit and it seems that Robert and John took in wagons and other property on insurance commissions and shipped them to Charles, who dickered the stuff off. The testimony recites that they were constantly making remittances to Charles and that when he would take a note for a team or anything like that the note would be sent down to the two brothers at Dubuque and that during this time the younger of the four brothers, Stanhope, remained in Michigan collecting up some old accounts, etc. In 1888 the mother, Jennie and the plaintiff along with Stanhope were brought to Dubuque and Charles came down there to visit. That they all set up housekeeping together, except Charles who with his wife returned to Marshall, Minn. and the business was carried on as he had been carrying it on before. In 1895 Charles had cleaned up the Minnesota enterprise and he then came to Des Moines where Stanhope had come in 1891. From 1893 the business had an agency with the Mutual Life Insurance Co. of New York, the control therefor was in the name of Robert J. Fleming and continued such on a commission and renewal basis until Dec. 31st, 1905.

In the meantime, in October, 1894, Robert was married again and as the fruits of that marriage there are two children, Charlotte born

181 November 5th, 1895 and John, April 11th, 1897. On the 14th day of December, 1896, the four brothers entered into the first written contract that ever had been made between them in reference to their business, which is set out on page 5 of the abstract and subsequently this was modified by the contract set out on pages 6 and 7 on the 23rd of January, 1897, and later on the 17th day of January, 1911. The instrument Exhibit 103, pages 8 and 9 of the Abstract, was executed and it is about these instruments and

the interpretation thereof and the rights thereunder that the principal questions in this case center. In speaking of the execution of the last instrument Mr. Robert Fleming on page 222 says that when they got the first contract and digested it and found the real piece of property they had was still in his name and that his brothers would have to settle with his wife in case of death, they drew up a second contract. These brothers went ahead and did business for a number of years finally building a colossal structure in Des Moines and incorporated for that purpose as Fleming Brothers. The corporation having \$500,000.00 in stock issued, \$125,000.00 was issued to each of the four brothers. This stock when issued was endorsed in blank and placed in an envelope and this envelope in turn placed in a box in an apartment in the safe in the Fleming Bros. office in Des Moines equally accessible to each of the four brothers. The matters continued in this shape until the death of Charles January 15th, 1916. Quite shortly after his death, he leaving surviving him this plaintiff as his widow, in fact a little less than a month, February 14th, 1916, Robert, John and Stanhope went to the office of Judge William E. Miller and brought the three contracts set out in the pleadings and introduced in evidence, Exhibits 101, 102 and 103,

with them and conferred with him as to the situation. (Abst.

182 Pages 206 and 207), and had several conferences with Judge Miller in reference to the same and finally about the 10th of April, 1916, Mr. Miller prepared the deeds, affidavits, petition for appointment of administrator introduced in evidence and on the 11th day of April was called to the office of Fleming Bros., where he found the three brothers and the plaintiff and these instruments were signed. About the circumstances of signing of which and the surroundings leading up thereto there is considerable conflict of testimony, but in view of the fact that no claim is made that these instruments affected the matter directly, this conflict is not material. We find Mr. Miller, on page 208 of the Abstract in the Answer to three interrogatories, taking these instruments as such out of the case.

The family compact claimed herein then so far as there is any shadow of claim for its existence rests entirely upon the Exhibits 101, 102 and 103 and upon nothing else. The father, as all fathers should perhaps, taught his children that it was their duty to stand together and be interested in one another's welfare. There is nothing in the record that shows that he ever had any idea of any such claims as are now put forth by the defendants' attorney. It would be a monstrous injustice to the memory of any man that he should have such. That he would undertake to teach his children, each of whom he might look to as in the future founder of a family with wife and children, that it was their duty not only to pool their earnings, but to so arrange those earnings that the family of the one dying first should have to depend solely and entirely upon and resort to a fund in the control of others, perhaps having families of their own without legal method whatever of enforcing their claims for support.

183 Neither is it conceivable that upon the death of the father that any such a compact was entered into. There was but one of the descendants of the elder Stanhope Fleming who was at

that time capable of entering into a contract. Robert was not yet 22 years of age. None of the others had yet arrived at the age of maturity. Charles was not 19. To enter into a compact of this character required contractual capacity at least, so we find there is nothing in that feature of the so-called family compact.

The evidence recites that while Charles was at Marshall and Stanhope at Des Moines, and Robert and John at Dubuque they constantly made remittances to him, etc. The evidence also shows that whenever they sent him property of theirs to be disposed of, he sent the notes back and the remittances were made back and forth between the brothers. Therefore, it simply shows what would ordinarily take place between even strangers in blood where such business relations exist as existed between these men. They had a lot of property they owned in common which was being taken care of by Charles at Marshall and disposed of for the benefit of all. He was devoting his time to that. They were trying to get out of the "box"—we might say—they had gotten into in the railroad work where they lost money and the others were opening up new avenues of business and devoting their time to that. Each, of course, was furthering the common interest, and there is no record—nothing to base any claim of any compact until Exhibit 101 is drawn and that, it will be noted, was after Robert had been married the second time and a child had been born to him; when it was evident, probably, so long a time having elapsed that Charles would have none; when John and Stanhope had not yet entered into any relations which gave promise of any future successors, so the language of counsel in arguing as to this remarkable family compact, while perhaps vividly descriptive of an idyllic dream, brings up no nearer to the solution of the questions involved in the case.

184 The only compact that can be found from the record is the compact, Exhibits 101, 102 and 103 set out in the Abstract pages 5 to 9 inclusive. On the 14th day of December, 1896, the four brothers signed Exhibit 101 and subsequently on the 23rd of January, 1897, executed Exhibit 102. These two contracts or declarations, or whatever they may be called, undertook—in our view—to place the property of the Fleming Brothers in such shape as between themselves they could each enjoy every incident of ownership, yet, at the death of one that ownership passed to the others. They were drawn by Judge Lenahan of Dubuque. Subsequently, January, 1911, the four brothers entered into another contract—which in our view—took the place of the first two and created a general partnership between the brothers with some of the same incidents included that were expressed in the previous contracts. To our view, the last contract, Exhibit 103, is a contract of partnership. It recites the ownership of the property which had been theretofore acquired and declared in full the terms upon which it would be held in the future. It was one of the peculiarities of Mr. Guernsey that any contract or other instrument drawn by another lawyer that was ever submitted to him that he did find a better way, in his judgment, to do what was undertaken to be done in the contract and in drawing this con-

tract, it was and could only have been his intention to regulate in full the relation of the four brothers to one another in their property matters in the future. That it was a partnership contract there can be no question. Had the instrument not have been drawn by one skilled in the law—there might be some room for argument—that the frequent use of the terms "partnership," "firm" and the phrases in connection with which these words were used did not evidence an intention to draft articles of partnership agreement, but to say a man with a standing of N. T. Guernsey in the legal profession did draw such a contract as Exhibit 103 using the word "partnership," at least eight times; using the word "firm" both in connection with the name and in connection with the property and not have the intention and the understanding that he was thereby creating a partnership, is inconceivable. Neither is it conceivable that men of the business experience of the Fleming Brothers, having to do as they did all the time with technicalities in drawing such contracts as policies of life insurance and carrying on the business they had carried on did sign such an instrument as Exhibit 103, and would have done so without an understanding it was creating a contract of partnership. In other words, we have a contract here that in at least eleven different places used words and phrases applicable only to a partnership drawn by one of the most skillful lawyers ever practicing at the Iowa Bar, signed and executed by four men, each of whom was skillful in the use of language and the making of contracts and conversant with the niceties of language with which to properly express ideas, drawing such a contract and it now being contended that the thing thereby created was not a partnership.

What was it that these men undertook to build up under this contract? What did they undertake to create? Who owned and did own the property that had accumulated or could accumulate? 186 Is it true that they could by a declaration of this character so fix their property that neither of them owned an interest therein and yet that intangible something they undertook to make did own it? That something was not a corporation and the contention now is that it is not a partnership. They undertake to say that the only interest that either shall have in the business is what he is drawing out. That the accumulations, whatever they may be, belong to this thing that you have created. Who, then, was the legal entity who did own it, the partnership as distinguished from the assets? What were the rights of each of the brothers therein? Let us suppose that one of the four, say Robert for instance, commits a tort of such a character as to subject himself to a suit in court and that a judgment, say for \$100,000, is rendered against him thereon and the holder of that judgment undertakes to subject Robert's interest in this estate or the accumulations of the partnership, or whatever you may call it. By the provisions of these contracts Robert has no interest at all. No creditor can reach it; the only interest is the interest that he himself may draw out. Now if Robert can do this and this is true as to Robert's interest—it is true as to the interest of Charles; true as to the interest of John and true as to

the interest of Stanhope. Here then you have a something unknown to the law created in which there is a vast accumulation of property owned by no other people on earth, then these four men—no one else having an interest therein. The property reaching probably the Million dollar mark or more and it being impossible for a creditor to reach or to take any part of it, so that the individual debts

of each of the four parties—who are the only parties on earth
187 who can own this property—can not be collected from any other source.

How long would this plea last in a court of justice undertaking to reach and subject the accumulations of this institution to the separate debts of the constituent members thereof? About as long as it would take the court to render a decree, after hearing the testimony. There is no limit upon what either of the four brothers may draw out. No limit upon what he may take for himself out of the common fund. You have then an accumulation of property here gotten together by the joint efforts of four brothers, each of whom may take whatever he desires for his own use; each of whom may have his interest therein subject to the payment of his debts. In other words, each of whom may during his whole life exercise dominion over the property and have all of the benefits of the same. In reality own his share in it and at the instant that life leaves his body, his estate is such—so far as this accumulation is concerned, his share of which a moment before was worth a quarter of a million, that an appointment of an administrator is unnecessary, and his widow—who has lived with him as his wife and assisted as wives do in performing the household duties, etc., in these accumulations is relegated to the other three members of the combination for charitable support; that for her sustenance they may dole out to her such sums as they may see fit to give; that she has no legal right that she can enforce and that even her expectation of a provision by a bounty of the remaining three is that should she survive them she will then be dependent upon the bounty of the surviving children of any one of them and if no children survive, some collateral relative may come in and take the whole accumulation and she be left

188 absolutely penniless on the world without even anyone to look to that she may receive that which is justly due her of the property accumulated by her husband. We do not believe that it is possible to create such an institution. We do not believe that this court will ever say that where an individual like Charles Fleming was a member of a co-partnership—such as this was—with the right to help himself during his lifetime to a full share of the partnership property, to have his creditors come in and take it and not be liable to an accounting therefor to the other members, can so fix his property that he can deprive his wife of an interest therein while he enjoys these rights himself up to the moment his breath leaves his body and as that breath leaves his body it changes from a man worth a quarter of a million to a corpse without any legal liability on his accumulations of a lifetime to pay for his coffin and see that the last rites are performed over his body and that his widow is turned adrift upon the world the object of an uncertain charity.

The language of the contract is that upon the death of either one of the undersigned, the property owned by the said partnership including all property standing in the names of the individual partners—which embraces certain stock in said Fleming brothers corporation—shall be and become the property of the surviving brothers of said partnership and all that said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein. In other words it remains his but as the last breath leaves his body it becomes theirs. So it would with a Will so this provision is certainly testamentary in character.

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Propositions

Proposition 1. The contract between the Fleming Bros., so far as it undertook to take the interest of one at his death and pass it to the others, is testamentary.

Burlington University vs. Barnett, 22 Ia. 60-92; Am. Dec. 376;

Tuttle vs. Raish, 116 Ia. 331;

Wilson vs. Carter, 132 Ia. 442;

Lever vs. Gauss, 62 Ia. 314;

Babb vs. Harrison (S. C.), 70 Am. Dec. 203;

Castor vs. Jones, 86 Ind. 289;

Gomez vs. Higgins, 30 So. 417.

Proposition 2. The provision for forfeiture of the interest of the partner by death or withdrawal is a penalty and hence the partnership existing between the Fleming Bros. could have been dissolved at any time by one of the brothers retiring and his interest was not forfeited.

Becker vs. Hill, 20 Lancaster Law Review 345 (Pa.).

Proposition 3. Where a provision in a contract is a penalty, the courts will enforce it only as to the actual damages.

Elzy vs. City of Winterset, 172 Ia. 643.

Proposition 4. The law looks with disfavor on attempts to deprive the wife of her rights in the property of her husband.

Collins vs. Collins, 98 Md. 473, 103 A. S. R. 408;

Beere vs. Beere, 79 Ia. 555;

Beechley vs. Beechley, 134 Ia. 75;

190 Higgins vs. Higgins, 109 A. S. R. 316, Ill.;

Thayer vs. Thayer, 39 Am. Dec. 211.

Proposition 5. It always has been and is now the policy of the laws governing Iowa, that the widow shall take her share of the property owned by the husband at the time of his death.

Sec. 2, Ordinance of 1787.

Sec. 3366, Code 1897;

Sec. 3362, Code 1897 and in corresponding sections in previous codes.

Proposition 6. In a gift the donor must part with title and dominion over the subject of the gift.

Vosberg vs. Mallory, 155 Ia. 165;
 Pyle vs. East, 173 Ia. 165;
 Oliver vs. Perry, 131 Ia. 654;
 Casteel vs. Flint, 112 Ia. 92;
 Stokes vs. Sprague, 110 Ia. 89.

Proposition 7. Charles Fleming died seized of a fourth interest in the Fleming Bros. partnership.

Moore vs. Bare, 11 Ia. 198;
 Hewitt vs. Rankin, 41 Ia. 35;
 Rowley on Partnership, 291-2.

191 APPELLEE'S REPLY (TO A REPLY BY APPELLANTS)

[Filed December 10th, 1918.]

Appellee's and Plaintiff's Reply

192 As by the rules of equity on an appeal the plaintiff of the court below has a right of the opening and closing. We think we need no apologies for filing this brief memorandum herein. Also in view of the somewhat extraordinary course this argument was taken, comments by Mr. Cummins, a letter of Mr. Guernsey attached to and set out in the argument—we believe we have some right of reply. That this case is of importance and great importance is evidenced by the fact that the defendants, appellants herein, are able to reach into the United States senate at a time that the issues growing out of the great war are to be settled and Mr. Cummins is pressing the resolution to restore telephonic communications between the Peace Conference and the senate and to see that the extraordinary course is pursued of having eight United States senators cross the Atlantic that they may observe whether or not the president performs his constitutional functions in negotiating treaties that are to be submitted to the senate for ratification and to cause him to appear after 15 years' absence from the courts of the state of Iowa in this case, warrants us in a conclusion that we should leave no stone unturned to present our views to this court and that they may be in writing to be read by the court. Also in view of the fact that the extraordinary course is pursued of attaching to the argument a letter from Mr. N. T. Guernsey, counsel for the great telephone trust, who left Des Moines with an annual salary far exceeding the competence that ninety men out of every hundred are unable to accumulate in a lifetime, our desire to have our views fully presented to this court, are somewhat augmented.

The complaint is made, both in the comments of Mr. Cummins and in the argument of Mr. Miller, that the subject of joint 193 tenancy was not mentioned in our original brief and Mr. Miller also comments very sarcastically upon one of the cases cited by us in the brief claiming that he was unable to find it. It

may be possible that he was, but the writer found it and found it in the Iowa State Law Library at the State House and cited it as a decision of a nisi prius court, not claiming that it was controlling, but that at least, if the reasoning was good, might he persuasive as to the point cited, and in the absence of authority in the courts of last resort, we think that such citations are admissible. As to the question of our not discussing joint tenancy we did not believe that a joint tenancy had been shown in this case. We believe also, even if an attempt had been made to show joint tenancy, that tenancy was simply a part of the . . . it they had to permit each member of the so-called brotherhood to enjoy during his whole lifetime all of the property that he accumulated and at his death have it disappear so that his wife could have no part of and no part in it, so she might be relegated to the uncertainty of whatever provisions the survivor or their survivors in the event of her surviving them might make for her. Further than that, we contend in this case that no joint tenancy was ever created by the instruments in question and particularly by the last instrument and our argument was along that line. What did each of the brothers own in this partnership? Each owned an interest in the partnership. The partnership, they say, owned the property. All partnerships own their property. The partner's right therein, is a share of the equities therein that may be left on the closing up of the affairs of the partnership, i. e. Paying of its debts

and the adjustment between the parties. This interest Mr. 194 Charles Fleming owned, held and controlled and enjoyed the benefits and reaped the emoluments therefrom until death took him away and at that instant they say all of his right ceased and determined, and not until then, so perhaps this might be true in a real joint tenancy.

Joint tenancies are not favored by the law. Ordinarily they are confined to land. Yet it is possible to claim a joint tenancy perhaps in personality. This matter was earlier before the courts of this country. In Kentucky, in 1814, in the case of Hart vs. Hawkins, reported in 3 Bibb, 522, in 6 American Decisions, 666. The court say, "The rule in this respect seems to be, that the right of survivorship is never allowed, wherever the partnership is for the purposes of trade, or the undertaking is in the nature of merchandising upon the hazard of profit or loss."

Joint tenancies were products of the English law. There resulted the feudal conditions calculated to carry that out and formerly it was held that all partnerships, unless contrary provision was made, were joint tenancies, whether in lands or personality; but while we were yet subjects of England in 1683 their High Court of Chancery in Jeffries vs. ——, 1 Vernon Ch. 217. "Two persons having stocked a farm and occupied it as joint tenants and one having died, there was a bill brought to relieve against survivorship. It was proven in the case that the deceased was informed what the consequences of the law were if he should die and he replied that he was contented that the flock should survive. The Lord Keeper was clearly of the opinion that the plaintiff ought to be relieved, that if the farm had

been taken jointly by them, and proved to be a good bargain,
 195 the survivor should have the benefit of it but as to a flock em-
 ployed in the way of trade—they should in no case survive." After discussing how the law merchants had modified the common law, as it heretofore existed on this subject, they further said: "When two persons become joint tenants or jointly interested in a thing by way of gift, or the like, then the same shall be subject to all of the consequences of the law; but as to a joint undertaking in the way of trade, or the like, it is otherwise, and decreed for the plaintiff accordingly."

Again in 1732 the High Court of Chancery of England in *Lake vs. Raddick, 3rd P. Williams, 157*, had before it a case where a lot of lands overflowed by the Thames River and the commissioners had assessed taxes to pay for improvements and the land owners abandoned the land and the commissioners conveyed them to five gentlemen, who undertook to improve them. The question of joint tenancy arose. It was originally contemplated that a large sum of money should be expended in the improvement of these lands by the purchaser to keep the river from overflowing and to reclaim them. A bill was brought by plaintiff for an accounting and division of the partnership assets. The Master of Rolls on debate decreed that survivorship should not take place and that the payment of the money created a trust for the purpose of advancing the same and an undertaking on the hazard of profits or loss was in the nature of merchandising where the right of survivorship in the *jus accrescendi* is never allowed and on appeal the decree of the Masters of Rolls was affirmed.

Such was the state of the common law that we inherited from England. That is that in undertakings in the way of trade
 196 and the co-partnership under discussion in this case was the undertaking in the way of trade—the rules of joint tenancy can not and do not apply. The right of survivorship does not exist. Hence, a joint tenancy could not be created; hence, any interest that would be conveyed by the contracts passed only at death. Mr. Miller in his argument urges that it was a consideration of the contracts in question.

As the contract is testamentary in character and all that, we think there can be no question that a consideration was paid makes no difference. *Lever vs. Goss, 670 Iowa, 314*, decides that.

So after we have carefully read the observations of the eminent Senator who the counsel in this case seemed to believe in his person revived the office *jure consult* known to their own law and after we have read the letter of Mr. Guernsey, who these gentlemen undertake now to say or intimate rather in using the words "partnership," "firms," "Contracts" and matters of that sort, should have applied to his legal work the rule that might be applied for one not skilled in the law to draw an instrument, and after we have read the enlightening argument of Mr. Miller, counsel in the case, in the vain hope that he might find the case of *Becker vs. Hill, 20 Lancaster Review, 345*, recited by some great ancestor of his and after we have taken full account of the confidences that these gentlemen express that

their view of the law will not be shocked by this court, we are still of the opinion that the instrument in question is testamentary in character; that it never created a joint tenancy and we have even heard of eminent counsel before who were shocked at the opinions of the court—which opinions stood the tests, criticisms and analysis and are still today controlling.

197 With these few observations, we rest the case to your Honors.

Respectfully submitted,

Parsons & Mills, Attorneys for Appellee.

198 APPELLANTS' PETITION FOR REHEARING

[Filed February 5th, 1920]

(Portions Stipulated as Being Deemed Material)

199 The opinion in this case affirming the decree of the district court of Polk County, Iowa, against the defendants was handed down December 16, 1919, and is reported in 174 Northwestern Reporter, 946, in the Advance Sheet issued January 9, 1920.

Petition for Rehearing

The appellants,—defendants below—respectfully petition this court for a rehearing of this case on the merits upon the following grounds and for the reasons hereinafter set forth:

Grounds for Reversal

I. The majority opinion and the decree which it affirms deprive the defendants of valuable vested and contract rights in violation of constitutional guaranties; that is to say:

(a) Whereas the contracts in controversy (being working agreements operating in *præsenti* upon valuable consideration under which defendants and their brother, plaintiff's deceased husband, jointly accumulated an estate not of inheritance but in the nature of a joint tenancy with the right of survivorship) were lawful when made and while in operation during the lifetime of the deceased, under Chapter 2, Title XVI and Sections 2923, 3362 and 3366 of the Code of Iowa and under Stewart v. Todd, Baker v. Syfritt, Vosberg v. Mallery, and other decisions of the Supreme Court of Iowa hereinafter cited; and

(b) Whereas, under said statutes and the decisions of said court construing them dower did not attach to the estate ^{so} 200-202 created and

(c) Whereas, by judicial legislation the decree and decision create a dower estate in plaintiff where none existed under the law so laid down, and carves it out of the joint estate vested in the

defendants, in violation of the express terms and plain intent of the contracts.

Therefore the decree and decision; (a) Impairs the obligation of the contracts in controversy contrary to and in violation of the the rights of the defendants under Article I, Section 10 of the Constitution of the United States, and Article I, Section 1, Constitution of Iowa; and (b) Deprives the defendants of property without due process of law, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(As to the jurisdiction of the Supreme Court of the United States in such case, on writ of error to this Court, see *Muhlker v. N. Y. & H. Rd. Co.*, 197 U. S., 544 and other like cases.)

(See also Ground II post of this petition.)

203 Propositions, Points, and Authorities in Support of the Petition for Rehearing

I.

(A) The contracts in controversy created and provided for a right of survivorship in the defendants analogous to that right as it exists in joint tenancies. This right of survivorship and all the consequences flowing from it were lawful and in harmony with public policy when the contracts were made. They continued to be lawful and in harmony with the known public policy of this state to and including the time of the death of Charles Fleming, indeed down to the time of the filing of the decision in this case.

Wood vs. Logue, 167 Ia., 436; *Ann. Cas.*, 1917B, 116;

Baker vs. Syfritt, 147 Ia., 49, 62;

Stewart vs. Todd, 173 N. W., 619, decided by this court, July 10, 1919;

Vosberg vs. Mallory, 155 Ia., 165;

Haulman vs. Haulman, 164 Ia., 471;

Lunning v. Lunning, — Ia., —, 168 N. W., 140;

Metler vs. Metler's Admrs., 19 N. J. E., 457;

McKinnon vs. McKinnon, 56 Fed., 409;

Smith vs. Douglas County, 254 Fed. Rep., 244;

Ann. Cas., 1917B, p. 57. Note, "Nature of Estate Resulting from Creation of Cotenancy."

204 & 205 (B) Since the contracts in respect to the provision for survivorship and otherwise were valid and in accord with public policy when executed and while being performed, the change in the public policy of this state (announced for the first time in this decision) is immaterial; and the decree and decision in the case at bar are an invasion and destruction of the contractual and property rights of the defendants repugnant to the constitution of the state. Art. 1, Sec. 1, and Art. 1, Sec. 10, U. S. Const., and XIV Amendment U. S. Const., Sec. 1.

Cooley's Principles of Constitutional Law, p. 313 (Edition of 1883);

White vs. Hart, 13 Wallace, 646;

Delmar vs. Insurance Co., 14 Wallace, 661;

Swan vs. Seemans, 9 Wallace, 254;
 Coppage vs. Kansas, 236 U. S., 1, 14;
 Cole vs. Brown-Hurley Hdwe. Co., 139 Ia., 487;
 Hunter vs. Coal Co., 175 Ia., 245, 271, 286.

Accordingly statutes expressly abolishing joint tenancies have been denied retroactive effect.

(Cal.) Dewey vs. Lambier, 7 Cal., 347;
 Greer vs. Blanchard, 40 Cal., 194;
 (Ky.) Barclay vs. Hendrick, 3 Dana, 378;
 Overton vs. Lacy, 6 T. B. Mon., 13, 17 Am. Dec. 111;
 (Kan.) Best vs. Tatum, 78 Kan., 215, 96 Pac., 140.

206 & 207 (1) The decision and decree violate the contract clause of the Constitution of the United States, Art. I, Sec. 10, in that a contract valid when made, going into effect instanter as an operating agreement and providing for survivorship and what is essentially a joint tenancy is declared void because of a newly discovered public policy newly and now for the first time declared which is contrary to the former decisions of this court.

Muhlker vs. New York & Harlem R. R. Co., 197 U. S. 544;

and

(2) The decree and decision deprive defendants of property without due process of law in and for that the interest which the decree and decision create in the plaintiff, viz., about one-eighth of the joint estate, is to be and must be carved out of the estate which pursuant to valid contracts (under law heretofore existing) vested in the defendants absolutely, as against the plaintiff, upon the death of Charles Fleming. This, in violation of the law of this state as settled in the authorities and statutes hereinbefore cited, and in contravention of the Constitution of the United States, fourteenth amendment, section one. (See also Ground 1 and Proposition I and subdivisions thereof.)

208 APPELLEE'S RESISTANCE TO PETITION FOR REHEARING

[Filed March 10, 1920. B. W. Garrett, Clerk Supreme Court of Iowa]

209 After an examination of the petition for rehearing, Appellee's attorneys at first concluded to file a motion to strike the major part of the same, for the reason that on the rehearing it undertakes to drag in questions not raised or argued on the original submission, but after reflection concluded that the objections to the petition for rehearing could as well be made in this form as by motion to strike. That a motion to strike would be sustained, seems to be pointed out in the State vs. Thomas, 173 Iowa, 408, we apprehend that the petition in so far as it undertakes to raise questions not proper to consider now, may be made by an objection to the consideration of those questions.

The petition undertakes to present questions arising under the

Federal Constitution for the first time in this case. It undertakes to present them partially by holding out the thought that it is practically judicial legislation for this court to decide as it did. This case was tried before Judge Dudley, and no question of a Constitutional character was disclosed by the record that came up from that court. Judge Dudley rendered a written opinion in the case and his written opinion is a part of the record in this court, and will be found in Appellee's amendment to Abstract of Record, beginning on page six and ending on page thirty. There is nothing in the opinion assailed in the petition that is not a practical affirmation of Judge Dudley's findings and his opinion, so that every question that could arise upon the opinion assailed in the petition arose on Judge Dudley's decision in the court below, therefore, the claimed Constitutional questions now for the first time attempted to be injected into the case, not only existed but were proper matters of defense before

Judge Dudley, and they existed in this case as they exist now.

210 When Judge Dudley filed his opinion they were as obvious then as now and if proper questions, should have been presented in the original presentation to this court.

This court has certain rules of practice. Rule 53, Subdivision 5, in treating of matters that should be set out in the presentation of cases to the Supreme Court by the appellant in his argument makes certain requirements as to what shall be set out in appellants' opening argument. Subdivision 5 of Rule 53 of the Statutes and Rules of this court is:

"The errors relied upon for a reversal. Following this the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. When textbooks are cited the number or date of the edition must be stated, with the number of the volume and the page or section. No alleged error, or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or in petition for rehearing."

The propositions called for in this rule are set out in appellants' brief and argument, commencing at page 71 and ending at page 82, and though we have carefully re-examined the fourteen propositions or points in this brief, we fail to discover anywhere therein anything that can be tortured even into the semblance of raising any of the Constitutional questions now attempted to be injected into the case. The query naturally suggests itself, why are these now raised? The lawyer who wrote the petition for rehearing is an able lawyer. He

211 knows what a rule means when he reads it. The rule says "No alleged error or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument or on petition for rehearing." Or in other words, the able counsel for appellants with full knowledge of

the foregoing rule, is now undertaking to get a decision of this court on questions suggested for the first time, and not in the points or propositions contained in the original argument, but raised for the first time in a petition for rehearing.

To do this, is to ask this court, to throw its rules to the wind, to ignore them, to go absolutely contrary to them, and that, where the rule is so plain that no room for construction is left of the language used. Not only that, but this court is asked by this petition for rehearing to ignore a rule that had been established as the law of this court by its own decision prior to the formal promulgation of Rule 53, and which is in substance the rule of about every appellate court that has ever had to consider the question in connection with a petition for rehearing.

A proposition not raised as required by rule 53, will not be considered by the court.

Lamkin vs. Lamkin, 177 Iowa, 584-99.

An attempt to raise a new point, or take a new position after filing original argument may be met by motion to strike.

State vs. Thomas, 173 Iowa, 408.

Appellant must fully develop his statement of legal points or propositions in his original brief and argument, or they will not be considered.

Dodge vs. Grain Shippers, 176 Iowa, 316.

212 We cite these cases, not that the rules need any interpretation, but merely as a reminder that this court has since the promulgation of the rule adhered to it.

Without any reference to rule 53, and as an original proposition according with the laws generally laid down by appellate courts, this court has always held that it was not proper to allow on rehearing matters to be insisted upon, that were not presented on the original hearing.

Hintrager vs. Hennessy, 46 Iowa, 600-4;

Tubessing vs. Ottumwa, 68 Iowa, 691-4.

Going into other States we find unanimity in the decisions that speak well for the soundness of the rule.

The general rule is that questions not presented and discussed upon the original hearing, will not be considered upon a petition for rehearing.

Henderson vs. Huey, 45 Ala. 275;

Grogan vs. Ruckle, 1 Cal. 193;

U. P. Ry. Co. vs. Colorado Postal Telegraph Co., 30 Col. 133—69 Pac. 564;

Hine vs. Clancy, 9 Ill. App. 190;

Mauer vs. Board of Commissions, 36 N. E. 1101 Ind.;

State vs. Coulter, 40 Kans. 673—20 Pac. 525;

Succession of Broom, 14 La. Ann. 67;

Phipp vs. Mo. Pac., 196 Mo. 321—95 S. W. 410;

Powell vs. Nev. C. & O. Ry., 28 Nev. 305; 82 Pac. 96;

McDonnell vs. Carson, 95 N. C. 377.

For further cases see Century Digest, Vol. 3, Sec. 3243, Appeal and Error, also Dec. Dig. Vol. 1, Appeal and Error, Sec. 835 (2).

Again the question naturally arises in the mind, why in 23 the face of such a unanimity of decisions will counsel present these propositions?

The answer is found in an examination of the decisions of the United States Supreme Court hereinafter cited. A consideration of the rules therein laid down and a consideration of the fact that, clients in this case appear to be ready not only to make a "last ditch" fight in this case, but to deny to the appellate herein, her rights, even though they may be now satisfied that into whatever tribunal this case may come, it will be decided as this court did on the opinion attacked in the petition. In other words, they hope that by an injection of the Federal question in this case, even though brought in too late; even though brought in at the time that the rules of this court will not allow a consideration, that this court may be induced to consider the question so that the basis may be made for a writ of error from the Supreme Court of the United States to this court, and the matters in litigation between these parties tied up for an indefinite period. A Federal question first set out and asserted in a petition for rehearing, after the judgment in the trial court had been affirmed by the highest court of the State, will not support the jurisdiction of the Federal Supreme Court on a writ of error where the petition was not entertained, but was denied without passing on the Federal questions thus tardily raised.

St. L. & S. F. R. R. Co. vs. Shepherd, 240 U. S. 240, 60 L. Ed. 622;

Waters Pierce Oil Co. vs. State of Texas, 212 U. S. 112.

The mere assertion in a State court, in a petition for rehearing of a right under the Federal Constitution, affords no ground for 24 invoking the appellate jurisdiction of the Federal Supreme Court unless the State Court in dealing with such petition considers and passes upon the Federal questions therein relied upon.

Boone vs. Scott, 233 U. S. 658—58 L. Ed. 1141.

Where, however, the Federal question is first raised by a petition for rehearing in the highest State Court, if the State Court passes upon the question, even though contrary to its rule, then the Federal question arises.

Ky. Union Co. vs. Kentucky, 219 U. S. 140—58 L. Ed. 137;
Ill. Cen. R. R. Co. vs. Kentucky, 218 U. S. 551, 54 L. Ed. 1147;

Sullivan vs. Texas, 207 U. S. 416—52 L. Ed. 274;

Grannis vs. Ordean, 234 U. S. 385—58 L. Ed. 1363.

It seems however, that the mere overruling of a petition, where the questions have been presented for the first time in the petition for rehearing, does not give jurisdiction to the Federal Court.

Consolidated Turnpike Co. vs. Norfolk & O. V. R. R. Co., 228 U. S. 326—57 L. Ed. 857;

McCorquodale vs. Texas, 211 U. S. 432—53 L. Ed. 269;

Forbes vs. State Council, 216 U. S. 396—54 L. Ed. 534.

With these remarks we submit the matter on our objections to the petition. We do not want to be understood as making any argument whatever upon the merits of the petition outside of the questions covered by our objections, but we are satisfied with the majority opinion in the case and believe the same to be 215 & 216 unassailable, and think that it furnishes a complete answer to everything that is urged by the appellants in the petition for rehearing, outside the matters which we believe cannot be, and should not be, considered in the matter, and therefore we ask that the petition be denied.

Respectfully submitted,

Parsons & Mills, Attorneys for the Appellee.

217 & 218 APPELLANTS' SECOND PETITION FOR REHEARING

[Filed February 17th, 1921, by and in the Office of B. W. Garrett,
Clerk of the Supreme Court of Iowa]

(Portions Stipulated as Being Deemed Material)

219 The original majority opinion in this cause was filed December 16, 1919, and reported in 174 N. W. Reporter at page 946, with dissenting opinion beginning on page 953.

The so-called supplemental majority opinion was filed December 20, 1920, and is reported in 180 N. W. Reporter, page 206, with dissenting opinion beginning on page 208.

220 Second Petition for Rehearing

The appellants respectfully petition for a rehearing in this cause generally, and especially upon the matters and things laid down and decided in the Supplemental Opinion herein handed 221 down as aforesaid December 20, 1920, and they base their petition upon the following, among other grounds, namely:

I.

Each and every of the grounds, propositions and conclusions set forth in the dissenting opinions by Salinger, J., beginning at the bottom of Column 2 on Page 208 of Volume 180 of the N. W. Reporter, as well as in Column 2 page 593 of Vol. 174 N. W. Reporter, are hereby adopted and made a part of this petition for rehearing as fully as if the same were set forth herein in detail.

222

VI.

There is a Federal question involved which should be considered by this Court.

It appears from the record and from the majority and dissenting opinions that in the last analysis the decision of the Court is grounded upon the proposition that in respect to personal property

a spouse cannot contract for a disposition thereof effective at the end of his or her life, without the written consent of the 223 other spouse. This new rule, if applied at all, must be applied regardless of whether the attempted disposition by contract affects the whole or any fractional part of the personal estate involved.

(a) That this was not the law of the state of Iowa at the time Charles Fleming made his contracts and had his various transactions with his brothers, has been abundantly demonstrated on the authorities cited.

(b) The rule is well settled that judicial interpretation of statutes becomes a part of them.

(c) The decision and majority opinions in this case therefore, change the meaning and effect of our statutes governing and affecting marital rights in personal property: they effect legislation though emanating from a judicial source.

(d) It is a case then of change in legislation by changing the judicial interpretation of that legislation.

(e) The three written contracts in controversy and the assignment of the insurance policies and of the corporation stock pursuant to those written contracts were made by the four brothers in good faith and in reliance upon the former judicial interpretation of the statutes of Iowa governing marital rights in personal property.

(f) The new decision and new interpretation which, if carried out, deprives the surviving brothers of at least one-eighth of their property held under and by virtue of said contracts, is therefore an impairment of the obligation of their contracts and operates to deprive them of their property without due process at law. And this is in violation of Article 1, Section 1 of the Constitution of Iowa and of Section 10, Article 1 of the Constitution of the United States and of Section 1 of the 14th Amendment to the Constitution of the United States.

That this creates a Federal question of which the 224 & 225 United States Supreme Court will take jurisdiction on writ of error, see

Muhlker vs. N. Y. & Harlem R. R. Co., 197 U. S. 544.

226 APPELLANTS' THIRD PETITION FOR REHEARING

[Filed Nov. 25, 1921. R. W. Garrett, Clerk Supreme Court of Iowa]

227 The original majority opinion in this cause was filed December 16, 1919, and reported in 174 N. W. Reporter at page 946, with dissenting opinion beginning on page 953.

A so-called supplemental majority opinion was filed December 20, 1920, and is reported in 180 N. W. Reporter, page 206, with dissenting opinion beginning on page 208.

A second rehearing was had and on opinion thereon was handed down September 28, 1921, reported in 184 N. W. Reporter, page 296, being found in Advance Sheet No. 7, of October 28, 1921, of the N. W. Reporter.

Third Petition for Rehearing

The appellants respectfully petition for a rehearing in this cause generally, and upon the matters and things laid down and decided in the supplemental opinion handed down herein December 20, 1920, and especially upon the matters and things laid down in the second supplemental opinion handed down September 28, 1921, reported as aforesaid in 184 N. W. Reporter, page 296; the appellants base their petition upon the following among other grounds, namely:

I.

Each and every of the grounds, propositions and conclusion set forth in the dissenting opinions by Salinger, J., beginning at the bottom of column 2 on page 208 of Volume 180 of the N. W. Reporter, as well as in column 2, page 593 of Volume 174 of the N. W. Reporter, are hereby adopted and made a part of this petition for rehearing as fully as if the same were set forth herein in detail.

228 & 229

II.

Every point, proposition and argument heretofore made to this court in this cause, contained in the appellants' original brief, appellants' reply, appellants' first petition for rehearing, and appellants' second petition for rehearing, are hereby urged and reiterated with the same force, confidence and effect as if set forth in detail herein, but the reprinting of the said matters in this petition for rehearing would unduly and improperly extend the record in this cause without facilitating the consideration thereof by this court, and therefore the appellants respectfully request and urge that all of the matters, authorities, arguments and things set forth in the documents above referred to and now on file in this court, be considered as a part of this third petition for rehearing with the same force and effect as if the same were set forth in detail herein.

230 In the Supreme Court of Iowa, December 10, 1918

Supreme Court No. 32408

[Title omitted.]

Appeal from Polk District Court

SUBMISSION OF CAUSE

This cause is submitted on abstracts and arguments on file and oral argument of counsel for both sides.

SR 31-111.

Ordered by the Court and entered of record on the 10th day of December, A. D. 1918.

A True Copy,

Attested:

B. W. Ganett, Clerk of Supreme Court
[Seal of the Supreme Court of Iowa.]

231 & 232

In the Supreme Court of Iowa

JUDGMENT RECORD ENTRY OR 5-576

ANNA B. FLEMING

vs.

ROBERT J. FLEMING et al., Appellants.

Appeal from Polk District Court

In this cause, the Court being fully advised in the premises, file their written opinion Affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellants pay the costs of this appeal, taxed at \$—, and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court, filed on the 16th day of December, 1919, in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 15th day of December A. D. 1922.

B. W. Ganett, Clerk Supreme Court. [Seal of the Supreme Court of Iowa.]

OPINION,

(Supreme Court of Iowa, Dec. 16, 1919.)

(No. 32408.)

FLEMING

v.

FLEMING et al.

1. Joint Tenancy *1—Nature and Elements.—The essential elements of an estate in joint tenancy are that it be held by two or more jointly, with a clear right in all to share in the enjoyment of the estate during their lives, and the tenants must have one and the same interest accruing by one and the same conveyance, commencing at one and at the same time, and the property must be held by one and the same undivided possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Joint Tenancy.]

*For other cases see same topic and key-number and all key-numbered digests and indexes.

2. Joint Tenancy *1—Commercial Enterprise as Subject to Joint Tenancy.—There can be no joint tenancy in a commercial enterprise dealing with the property, or profits of an insurance business.

3. Partnership *17—Intent as Determining Element.—As between the parties, the true test as to whether or not they are associated as partners is the intention with which they have entered into the relation, a partnership in its true sense being formed for the purpose of trade or business, the profits realized from such business being the property of the persons associated, and in determining whether a partnership was intended, the whole situation at the time the agreement was made, and all surrounding circumstances, may be considered, as well as the subsequent admissions of the parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

234 4. Dower *17—Joint Tenancy *1—Partnership *3—Property Held by Husband Subject to Right of Dower.—Where four brothers entered into written agreements to devote their time to the insurance business as a common enterprise, each having the right to withdraw funds, as needed, without an accounting, such withdrawals to represent the entire interest of the member, and that upon the death of any member the property held by the association was to become that of the survivors the association held to be one of partnership, and not of joint tenancy, so that on the death of a partner, his share was subject to his widow's dower rights.

Salinger, J., dissenting.

Appeal from District Court, Polk County

Charles A. Dudley, Judge

Action by a widow to have her distributive share ascertained, determined, and set off in what she claims to be partnership property. The defense is that the property was owned in joint tenancy, and is therefore not subject to her claim to dower therein. Decree for the plaintiff in the court below. Defendants appeal. Affirmed.

William E. Miller and Albert B. Cummins, both of Des Moines, for appellants.

Parsons & Mills, of Des Moines, for appellee.

GAYNOR, J.: This action is in equity, brought by Anna B. Fleming, as the surviving widow of Charles Fleming, against his surviving brothers as individuals, who, named in the order of seniority, are Robert J., John A., and Stanhope Fleming; and against Fleming

*For other cases see same topic and key-number and all key-numbered digests and indexes.

Bros., an alleged partnership, composed of deceased and the three brothers above named; and against John A. Fleming as administrator of the estate of Charles Fleming.

The plaintiff's claim is that her husband, Charles, died seized and possessed of an interest in certain property now in the possession and held by these defendants; that they refuse to recognize her right to a distributive share therein, and claim to own the same against the right asserted by her.

The original purpose of the action was to have, ascertain, and set aside to her, as the surviving widow of Charles, her distributive share in so much of the property as her husband died seized or possessed. She claims that he died seized and possessed of an interest in the property now in the hands of these defendants or some of them.

Here the issues are narrowed to the ascertainment of whether or not plaintiff's husband, Charles, died seized or possessed of any interest in the property held by these defendants or some of them. If it be determined that he had an interest in the property at the time he died, then she is entitled to a distributive share therein, and her claim must be recognized and enforced, but the amount of her interest is not the subject of investigation at this time for, by agreement of parties this is left for future consideration and determination by the nisi prius court. The determination of the question here involves only the proper construction of the three writings on which defendants rely to defeat her claim, to which specific reference will be made hereafter.

It appears that up to and at the time Charles died, Fleming Bros., including the deceased, Charles, owned quite a large estate, consisting of both real and personal property. The question to be determined is whether this property was owned by these four brothers as joint tenants, with a right of survivorship, or whether it was owned by them as partners. It is the claim of the defendants that all the property in controversy, prior to and at the time of Charles' death, was held by these four brothers as joint tenants, to which the right of survivorship attached; that upon the death of Charles, all his interest in the property ceased, and this by virtue of the terms of certain written instruments under which the business was conducted and the property acquired and held at the time Charles died.

Charles Fleming, the deceased, was married to the plaintiff on the 2d day of January, 1880, and died in Polk county, January 15, 1916.

The first instrument on which the defendants reply to cut off this widow from a right to share in the accumulation of all these years of her husband's faithful service and toilsome labor represented by the property in question was made on the 14th day of December, 1896, and at a time when but a small portion of the accumulated fortune, which is the subject of this litigation, had come into existence. It reads as follows:

Know all men by these presents that we, Robert J. Fleming, Charles Fleming, John A. Fleming, and Stanhope Fleming, of the city of Des Moines, state of Iowa, in order to provide for the

future uninterrupted prosecution of the business of life insurance in which we are now or may be hereafter engaged and mutually associated, and to fix and determine the interests of each therein, hereby mutually agree, and bind ourselves, our heirs, executors, administrators or survivors and all other persons, that, each of the parties to this stipulation and agreement, shall have only such share of, and interest in the profits, earnings and income of the business of life insurance in which we are or shall be jointly engaged, as shall be actually received by each or paid upon the order of each, with the consent of the others, from the income of said business. And such amount so paid shall fully represent the share and interest of each of the parties hereto, at any time while we, the undersigned, shall be associated together in said business or thereafter. Upon 235 the death or withdrawal of any party hereto, all his interest in said business shall thereupon cease and determine and at no time shall any accounting be made or required to be made by any party hereto, his representatives, executors, heirs or survivors, or any other person claiming under him, or to any person, officer or representative, upon any basis of labor performed or money received on account of said business by any of the parties hereto or otherwise. And it is distinctly understood and agreed between the parties hereto that they, nor any of them have, or can have any property rights, or money interests in said business other than that herein specified and defined, and any sum of money paid to or for any party hereto shall be in full of the interest of said party in said business.

No doubt, deeming that this instrument did not fully express the purpose and intent of the parties, and might not be construed to effectuate their purpose and intent, they made a second instrument on the 23d day of January, 1897, as follows:

Know all men by these presents that we, Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming of the city of Des Moines, Iowa, in view of our past association in, and the manner of the conduct of our business without the usual and ordinary incidents of a partnership, and to more effectually define and determine our individual interests in said business in the future, as between ourselves, and in relation to all other persons, and to prove for the future uninterrupted prosecution of said business in which we are now engaged, or may be hereafter associated, hereby mutually agree and bind ourselves, our heirs, executors, administrators, survivors, and all other persons as follows: That in consideration of the services of each of us rendered, or hereafter to be rendered in the business of life insurance, of the income to be derived therefrom and of the mutual stipulations herein contained, each of the parties to this agreement has, and hereafter shall have, only such share of, and interest in the profits, earnings, renewals due or to become due under any and all contracts of insurance, or commissions thereon, to whomsoever nominally payable in the business of life insurance in which we are now or any of us shall hereafter be jointly engaged, as shall be actually received by each, or shall be paid upon the order of each with the

consent of the others, from the general funds or income of said business; and any sum or amount so paid shall fully represent the share and interest of each of the parties hereto at any time while any of the undersigned shall be associated together in said business or thereafter. It is further agreed that upon the death or withdrawal of any party hereto, all his interest in said business, and in the assets thereof, shall thereupon cease and determine; and at no time shall any accounting be made, or required to any person, or any party hereto, or their heirs, executors, administrators, survivors or representatives. It is further stipulated and agreed that any and all contract rights, and all interest in renewals of policies of insurance in the Mutual Life Insurance Company of New York, due or to become due since January, 1893, all commissions earned or hereafter to be earned, and all bonuses, allowed payable or to become payable in any manner, whether payable to or standing in the name of Robert J. Fleming or any other of the parties to this agreement, are hereby assigned and transferred to, for the mutual benefit of the parties hereto, to be used, applied and disposed of in the manner only as herein agreed and provided for. It being the intention of all the parties to this agreement, and they hereby declare that they, nor any of them have, or can have any property rights or money interest in said business other than that herein specified and defined, so long as any of them shall be associated together in the business of life insurance.

Under these two instruments, they continued their labors and prosecution of the business in which they were engaged and mutually associated, and further property was accumulated through the joint efforts, and a large estate created. However, on the 7th day of January, 1911, feeling that they had not yet fully expressed in writing their relationship to each other and to the estate that had been and was being accumulated, they made a third writing as follows:

"Whereas, the undersigned, Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming are engaged in the life insurance business in the states of Iowa, Nebraska and Wyoming under a contract with the Massachusetts Mutual Life Insurance Company; and,

"Whereas, each of the undersigned is the owner of one-fourth of the stock of a corporation organized under the laws of the state of Iowa known as Fleming Bros., Incorporated; and

"Whereas, the undersigned also are the owners of certain real estate and other property in which each of them is interested; and,

"Whereas, the undersigned expect to acquire additional property hereafter; and,

"Whereas, the said property now held and owned by the undersigned has been acquired by them with the understanding that it shall be disposed of as hereinafter set out:

"Now, therefore, in consideration of the premises and one dollar in hand paid by each of the undersigned to each of the others whose names are signed hereto;

"This agreement made and entered into by and between the said Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming on the 17th day of January, A. D. 1911, will witness:

"1st. That the partnership between the undersigned is with the express and distinct understanding and agreement that all of the property heretofore acquired by the undersigned has been acquired as the results of the said partnership, and that said property now belongs to the said partnership, including all proceeds of said insurance business with the renewals to which the parties hereto may be entitled thereon.

"2d. That upon the death of either one of the undersigned, the property then owned by the said partnership, including all 236 property standing in the names of the individual partners which embraces said stock in Fleming Bros., Incorporated, shall be and become the property of the surviving brothers of the said partnership, and that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein, and the sole and entire interest of his estate therein.

"The premiums upon all insurance carried by the undersigned, whether life or accident (except policy No. 741051 in the Mutual Life Insurance Company of New York, upon the life of Robert J. Fleming, payable to Emma D. Fleming, his wife, which policy is not a part of said partnership property), have been paid by the said partnership, and the said partnership is entitled to the proceeds of all such insurance except the policy above referred to payable to Emma D. Fleming.

"3d. This contract covers not only the property now owned, but also property hereafter acquired, and all hereafter acquired property, including the proceeds of life insurance, whether standing in the name of the said individuals, or either of them, or in the firm name, is understood to be firm property, unless there be an express agreement to the contrary.

"Executed in quadruplicate."

In this third instrument the parties to the first two instruments have undertaken to define the relationship existing between them, and to more clearly state the relationship they sustained to the property, and to define more clearly what they meant when they said in the first two contracts, to wit, "In order to provide for the future uninterrupted prosecution of the business of life insurance, in which we are now or may be hereafter engaged and mutually associated." This last instrument is the last expression of these parties touching the subject-matter of all three contracts, and they themselves have therein stated, in words that have definite and legal signification, what they understood the relationship was under which they were operating.

We look to what is written in these three instruments, taken as one instrument, to find the thought that lies back of the writing, the purpose and intent of the parties in the making of the writing, and to find the legal status that the writings create. That these parties had a purpose and an intent to accomplish something touching their

rights, duties, and obligations to each other in the making of the instruments and a purpose to fix the rights of each in the property accumulated and to be accumulated, must be assumed. Within these instruments the height, depth, width, and length of that purpose must be found. The thought of the brothers could not have been that the title to the property acquired as it came into existence should vest in no one, except the portion taken and appropriated by each to his immediate needs. The title to property that can be the subject of ownership, we must assume, vests in some one, whether it be an individual, individuals, or a legal entity. This property, when it came into existence, vested in these brothers. They became vested with the title as joint tenants, or they became vested with the title as tenants in common, or they became vested with the title as copartnership. The character of the title held by these defendants is the subject of our investigation, and controls the rights of this plaintiff. Within the cover of these writings must be found all that these men had in mind touching their personal relationship and their relationship to, and interest in, the property accumulated by the joint efforts. As the third writing is the last expression of the minds of all these parties touching their relationship to each other and to the property, it might well be considered the controlling expression, determinative of their relationship and their rights in and to the property at the time Charles died. The property in question came into existence only by the joint efforts of these men, working hand in hand, shoulder to shoulder, in a common enterprise, with a common purpose. That purpose was the accumulation of property, the building up of a fortune. During the years that have passed by, each has labored faithfully, and through his labor, joined with the labor of his brothers, the subject-matter of this controversy has been created. What they have said in these contracts and what they have done in execution of the purpose therein expressed, is the only expression of the thought and purpose to which our minds are directed. These writings, considered together, show the mutual understanding and purpose of the parties.

We need not here enter into any discussion of the origin and purpose of a joint tenancy. Its origin and character was feudal. It was of English origin, and highly favored, at first, for reasons that were feudal. But whatever causes may have led to the origin of such an estate, or that commended it to the minds of the great jurists of that time, it unquestionably has grown into much disfavor in this country and in England. Some states have denied the existence of it in any except real property. See *Hart v. Hart*, 201 Mich. 207, 167 N. W. 337. Some have abolished it altogether, and some require strict proof. It has been condemned because it imperils the future of those whom the law assumes to guard and protect. Under our law, the wife, the weaker vessel, the one who maintains the home and rears the children, is entitled to have provision made for her, if, peradventure, death robs her of the one legally and morally pledged to support and maintain her. She is entitled to share in such of his estate as by his efforts he accumulates and leaves at his death. The husband cannot take this from her by any testamentary

disposition. He cannot contract with her for its release. In view of the legal status of the wife, in view of the relationship which she sustains to her husband, in view of those provisions of statute that protect and guard her interest during his life and after he is dead, it would seem to be against the policy of the law, expressed in the statutes, to permit men to legally get together and agree with each other that, upon their death, their wives and children shall receive no portion of the estate which they spent their lives in accumulating. It is a clear fraud on the marital rights of the wife. Many a wife has been a faithful helper in the building of great fortunes. Many a wife, by economy and self-denial, has been a strong factor in the building. Yet we are asked to say that this wife, who has done faithful service and practiced self-denial for 36 years that something might be left for declining years, must be left penniless. These are some of the features that bring this kind of tenancy into disfavor and show that it cannot be made to defeat a wife's claim under the statute.

[1] The essential elements of an estate in joint tenancy are that it be held by two or more jointly, with a clear right in all to share in the enjoyment of the thing during their lives. There are four requisites: The tenants must have one and the same interest. The interest must accrue by one and the same conveyance, except as modified by the statute of uses. They must commence at one and the same time, and the property must be held by one and the same undivided possession. If such an estate be recognized and the rights of parties to create it with all its unnatural consequences, the consequences that legally flow from it must be permitted to flow, no matter what this court may think of the justice or injustice of it, and though it leave this wife to the cold charity of an unsympathetic world. In none of the writings did these brothers bind themselves to make any provision for her. If she receive aught from them, it comes to her, not as a matter of right, but as a matter of grace.

It is true that under the common law, an estate may be created and held in joint tenancy. The estate is joined in the number of persons interested. No matter what the number of parties interested may be, the tenants are regarded as one individual. The right that each has in the joint estate continues during his life, and terminates with his death. The survivors, still considered as one person, hold the estate by right of survivorship. The last survivor takes the whole estate, and then it becomes, for the first time, an estate of inheritance, and passes to his heirs or legal representatives. While the tenants are considered as one person, and the estate joint, yet each of the tenants has a moiety interest. Or, in other words, while each joint tenant is regarded as having the whole of the estate, his interest in the estate may be put to an end or severed during his life. Each joint tenant, during his life, may dispose of his share by the usual modes of conveyance, but if he die without making such disposition, the title to the thing, which is the subject of the joint tenancy, remains in the survivor or survivors, free from the share or moiety of the one who dies. At common law, the sale by a joint tenant of his share during his life was regarded as a cutting off of that share from

the joint tenancy, and that share then was discharged from the incidents of joint tenancy, and passed to the grantee to be held as a tenancy in common. But unless some disposition is made by one of the joint tenants of his interest, and the estate is permitted to remain as a joint tenancy until death, it remains by the right of survivorship in the other tenants. So as between ourselves, each tenant has a distinct right, but the right of each tenant is equal in every respect. So it is said that a joint tenancy is distinguished by unity of possession, unity of interest, and unity of title. It was the purpose of the feudal system to keep the title in one person, but this seems to have been touching lands only. It, however, in modern times has been recognized as a right in personal property as well, but never so recognized in this state, or generally, as applying to commercial enterprises.

[2] Considering the foundation upon which the doctrine of joint tenancy rests, it is the opinion of this court that it does not apply to commercial enterprises of this kind, and that no joint tenancy can arise out of a commercial enterprise such as we have here before us in this case. It is inconsistent with the very foundation principle upon which joint tenancy exists or can exist.

Analyzing these writings, we find that at the time the first instrument was made the parties had in mind that they were associated together, in some way, not expressed in this writing, and engaged in a business from which mutual profit would arise, and out of which property of value would come; that each had, so long as he lived, a right to use a portion of the income and profits of the business in which they were so mutually associated; that, whenever his needs required, and to that extent only, he had a right to take from the earnings and income of the business such sum as he needed, upon the order or with the consent of the others. This provision was intended to cover the immediate needs of each of the parties so associated and engaged in the business. Its purpose evidently was to forestall any extravagant tendencies on the part of any of the brothers, and to conserve the interests and profits of the business to the end that the business might not suffer from extravagance and be continued uninterrupted. To say that when one of these parties took from the

profits of the concern any sum of money, however small, to 238 meet his immediate needs, the same, when taken, measured his interest in all the accumulations of the past years could not have been intended to be literally construed.

If the parties were, in fact and law, joint tenants, then each had a right to enjoy the income of the estate, and the fact that one of the tenants appropriated a portion of the income to his own use could not have the effect of destroying his interest in the subject-matter of the tenancy. The idea of joint tenancy is that each tenant has a right to an equal enjoyment of the thing which is the subject-matter of the tenancy. If the receiving of any portion of the income or the profits of the estate had the effect of destroying the interest of each in the subject-matter of the tenancy, then, upon the appropriation of any of the profits by the tenants, or any of them, the joint tenancy would cease. The provision of the contract above referred to

must have been intended as limiting the right to enjoy the income and profits of the business, and not to take his right in the subject-matter of the tenancy. His right to take was measured by his needs. What he took was a declaration, by the taking, of his then needs, and measured his right, at that time, to take to his personal use the income and profits. It does not mean that it measured or could measure his interest in the property accumulated by the joint efforts of the parties, or that the sum of money received determined his interest in the property.

The second contract, though changed in wording, expresses practically the same thought, with the added purpose to transfer to the entity, whatever it is, all rights of Robert J., under his contract with the Mutual Life Insurance Company of New York.

It will be noted that in the first two writings no direct provision is made for the vesting of the title to accumulated property in any designated entity or person. It is now assumed by these defendants that it vested in the brothers as joint tenants. No estate in the tangible property that accumulated as a result of the business enterprise is by express provision vested in any person, persons, or entity. We turn therefore to the third writing for further light as to the purpose and intent of these parties, and the status created by the preceding writings.

It appears that between the time of the making of the second contract and this third contract, Fleming Bros. had incorporated, or a corporation was created known as Fleming Bros., Incorporated. This corporation issued to each of the brothers stock in equal parts, we take it, and each undertook to assign his stock by writing his name on the back thereof, without naming the assignee, and deposited it in a receptacle which it is claimed was under the control of all four of the brothers. This third contract makes plain what is wanting in the other contracts, and says that they were associated together as a partnership, and that the partnership is with the express and distinct understanding and agreement that all the property heretofore acquired by the undersigned had been acquired as the result of said partnership, and that said property now belongs to said partnership. Reading the previous writings in the light of the revelations made in the third writing, it is not as difficult to understand and to give legal force and efficacy to what is therein said. We take it that these four brothers organized a partnership with the understanding that the business carried on by the partnership should remain intact, and that the future of the business should be uninterrupted in its prosecution; that the title to the earnings and income of the business, the accumulated assets, should vest in the partnership; that each party should have a right to take, with the consent of the others, so much of the earnings of the partnership as his needs demanded, be this great or small; that he should never afterwards be called on to account to the partnership therefor. Their labors were all in the interest of the partnership. The only source from which a livelihood could come was through the earnings and income of the partnership for which they labored. They evidently had confidence in each other; confidence that each would labor to his fullest extent in the

interest of a common enterprise, and that each would be frugal, and take no more from the earnings and profits of the partnership than was necessary to meet his personal needs, and so the restriction was made as it appears in the first and second contracts, in fact, in all the contracts. Each, having confidence in the integrity of the other, agreed that no accounting should be had of their labor. That is, they would assume that the labor of each equaled the labor of the other in the interests of the partnership. The desire was to keep the partnership a going concern, and that there should be no interruption in the prosecution of the business; that no one should be permitted to draw from the company, for his personal use or otherwise, any sum of money that might tend to cripple the partnership in the prosecution of the business for which it was created. After they had organized the corporation, an aliquot part of the corporate stock was issued to each of the brothers. Each brother undertook to assign the stock issued to him. The assignment was made in blank, but we find was intended to be assigned to Fleming Bros., a partnership, though it was not named as assignee.

It is further said in the third writing that it is made with the understanding that all the profits heretofore acquired by said partnership have been acquired as the result of said partnership, and that said property now belongs to said partnership, including all property of said insurance business, with the renewals to which the 239 parties hereto may be entitled thereon. And we have them saying in this third writing:

"We are engaged as partners, in the life insurance business, mutually associated together as partners, and as such we desire to provide for the future uninterrupted of the business in which the partnership is engaged."

But it is said that the fact that they called themselves partners, or that they were there engaged in a common enterprise or business, is not controlling; that there is nothing in a name; that the relationship must be determined from the entire writing; that the writing does not disclose all elements that are essential to constitute a partnership; that a partnership is a contract, and the contract determines the relationship of the parties to each other, and whether a partnership exists; that the mere fact that they, in this third writing, say many times that they are partners, that a partnership exists, that the property is held by a partnership, does not determine their relationship to the property, or their interest in the property, or the character of the association by which their interests are united.

A slight history of the origin of partnership will not be out of place at this time. Originally, it was founded on confidence, independent of any contractual relationship. Because of the fact that in the early days families followed one occupation, these partnerships usually were found to exist among relatives. Though founded in confidence in the early days, in modern times it was recognized as a contractual relationship. It grew out of the necessities of trade, but confidential relationship was retained in the modern law. At the time the law

courts first gave cognizance to what is known as partnership relationship, they were familiar with tenancies in common and joint tenancies. However, under joint and common tenancies, the co-owners sustained no confidential relationships to each other. At least, not such as is found in modern partnership, and the right of agency did not exist among the joint co-owners. After passing through many stages of formation, the law came to regard partnership as an entity, something separate and distinct from the individuals, and, in some respects, much the same as a corporation is separate and distinct from its stockholders. At common law a partnership was nothing more than an association of individuals. A firm was recognized as a short form of expression to designate partners collectively. The early decisions touching partnership depend a great deal on the viewpoint of the particular judge, whether he had a mercantile conception or a common-law conception of a partnership, so the courts have sometimes reached different conclusions, although the facts upon which they based their conclusion were substantially the same. Originally, there were different theories of partnership. One that it was a separate entity like a corporation; the other, that it was a mere association of natural persons. Some consider it a status something like marriage. We find, however, Chancellor Kent defining it thus, 3 Kent's Commentaries, p. 23:

"A contract of two or more persons to place their money, effects, labor and skill, or some, or all of them, in lawful commerce or business, and to divide the profits and bear the losses in certain proportions."

Other writers define it as a combination of two or more persons of capital or labor or skill for the purpose of business for their common benefit. Gilmore on Partnership, on pages 1 to 6, defines it thus:

"Partnership is a relation existing, by virtue of a contract, express or implied, between persons carrying on a business owned in common, with a view of profit to be shared by them."

It is defined in the English Partnership Act of 1890, 53 and 54 Vict. c. 39, par. 1, "as the relation which subsists between persons carrying on a business in common with a view of profit."

Partnership implies that there is more than one person interested in it, and there is implied a mutual consent to the association, but that is not controlling, since there may be organizations, by mutual consent, which are not partnerships, such as churches. A partnership, in its true sense, is formed for the purpose of trade or business, and the profits realized from the business must be the property of the persons associated, if they are to be treated as partners. *Bottler's Ass'n v. Fennerty*, 81 Mo. App. 525; *Burt v. Lathrop*, 52 Mich, 106, 17 N. W. 716.

[3] As between the parties, the true test as to whether or not they are associated as partners is the intention with which they have entered into the relation. It is the legal intent or manifest intent of the parties that determine whether a partnership exists. In deter-

mining whether the parties to a contract intended to become partners, the court will take into consideration the whole situation existing at the time the agreement was made, and all the circumstances surrounding the transaction, as well as the subsequent admissions of the parties. That it is not denominated a partnership in the contract is not fatal. Where the agreement contains all the elements necessary to create a partnership, then the intention of the parties is clear, and none of the tests which are applied to determine whether a partnership exists are needed. But where the contract contains only part of the elements of a true partnership, and it becomes important to ascertain the intent of the parties, legal tests may be applied. It follows that where persons enter into an agreement to engage in a joint enterprise, and agree to share the profits, a presumption arises that they intend to be partners as between themselves.

240 It is only made stronger by proof of an express agreement to share profits and losses. Where there is an agreement to engage in a business for the common good of all, and each agrees to devote his entire time to the business, and each is to share in the profits of the business, it is necessarily implied that each must share in the losses of the business, and especially may it be implied when, as in this case, each of the parties has agreed to put all his property, all his labor, all his time, and all his energies into the business. It may then be assumed that he subjects by so doing and agrees to subject himself, to all the losses which flow from the enterprise, for he has staked his all upon the cast, and he must stand the hazard of the die. So it follows that, though we find in this contract no express agreement to share losses, the wording of the contract and the character of the business is such that it is inevitable that each must have intended to share the losses.

[4] It must be borne in mind that the right of survivorship is only an incident to joint tenancy. It follows as a legal consequence from the creation of the joint tenancy. The joint tenancy, when created, vests in each of the tenants a common right in the property which does not survive his death, unless he becomes the last survivor of all the tenants. Then, for the first time, does that which before consisted in a practical sense, of a life estate in the property, become vested as an estate of inheritance. In a legal sense, his death does not transfer the rights that he possessed in the property to the surviving tenants. Death does not enlarge or change the estate. Death terminates his interest in the estate. It is rather a falling away of the tenant from the estate than the passing of the estate to others. It remains with the surviving tenants jointly, while in a partnership the partner is vested with an estate that survives his death. He has always an inheritable estate so long as he lives, and on his death that interest passes to his legal representatives. So that in a partnership, when one partner dies, his legal representatives become vested with whatever interest he had in the partnership, and his wife to her distributive share. He dies then possessed of an estate that passes to his legal representatives. His wife's share cannot be affected by any testamentary disposition made by the husband. It can be affected by no disposition made by the hus-

band which must take effect after his death, and not effectual during his lifetime. So it follows that in this property the deceased had an inheritable interest. On his death it passed to his legal representatives, and his wife became vested with her distributive share, which must be recognized and enforced.

We find, therefore, that a partnership existed between these parties. The provision, therefore, in the contract, that upon the death of any member his interest in the partnership property should pass to his brother partners is an attempt to make a testamentary disposition of the interest of each partner. A fair consideration of all these instruments shows that they were not understood as creating a joint tenancy. It fairly shows that all the brothers understood that they were associated together as partners, and that a partnership existed. An attempt to create survivorship among partners is an attempt to make a testamentary disposition of the dying partner's property or his interest in the partnership property, in favor of the surviving partners, to take effect after his death.

We are satisfied with the decree of the district court, and its judgment is affirmed.

Affirmed.

Ladd, C. J., and Weaver, Evans, Preston, and Stevens, JJ., concur.

DISSENTING OPINION

SALINGER, J. (dissenting): I. The majority opinion is fine literature. It discloses much research and learning. It is clear in the statement of thought units. On first reading, while reading, one finds nothing to differ from. Having finished, there seems to be nothing objectionable that is outstanding. Somewhat later, one finds a qualm of unrest suggested, such as sometimes follows too enjoyable a banquet. The reader can readily recall many fine passages and sound statements of law. But it now occurs to him that he cannot so readily understand why the opinion affirms. On another reading, made for the purpose of getting clear on this point, he does find some grounds for affirmance stated. Part of them are buried in the argument, and all the grounds are few in number. Every reason set forth as a ground for affirmance is contrary to well-settled law, and to both older and recent decisions in this court. In some of these opposing decisions the writer of the majority opinion and some of those who now join them spoke for the court. The opinion makes no reference to any of these. In a word, the final conclusion would seem to be reached because every argument urged in its support is untenable.

Reference has been had to grounds buried in argument. Some confusion exists as to what is argument and what is relied upon as a ground for the final conclusion reached. In this class are attempts to construe the three writings into which the parties entered. This construction deals with the purpose and object of the writings, the relation of each of the writings to each of the others, and to all three, and it singles out one part of the writings and construes it to mean

what it most clearly does not say. I may as well say at this point as say it anywhere that, in my opinion, this case presents no writings to be construed; that the writings themselves are so clear that 241 no judicial construction is warranted; that here there is no question as to what was done and intended; and that the sole question is what is the effect of that which has been written. To what that effect is I shall, of course, recur later.

The majority declares:

"The determination of the question before us involves no more than the proper construction of the three writings on which the defendants rely to defeat the claims of the plaintiff;" that "within the cover of the three writings must be found all that these men had in mind touching their personal relationship and their interest in the property accumulated by their joint efforts."

It declares that we must look to "what is written in the three instruments taken as one instrument to find the thought that lies back of the writing, the purpose and intent of the party making the writing." It is said that "within these three instruments the height, depth, width, and length of their purpose must be found," and that to the three writings construed as one one we must look to determine status created by the writings, and whether the three create a joint tenancy. There is more along the same line, but this must suffice to point out that it is recognized for the time being that the question before us must be resolved by treating the three writings together as expressing what there is to decide. With this much I am in full accord. I do not find it so easy, however, to be in accord also with other parts of the opinion, wherein it is declared that "we must turn to the third for further light as to the purpose and intent and status created by the two preceding writings," that this is so far one thing because the last writing "is the last expression as to the subject of all three contracts," and that "it might well be considered the controlling expression, determinative of the relationship and the rights of the parties in the property, because it is the last expression." I pass, without further comment, the naked fact of the contradictoriness of these positions, and next address myself to a consideration of what is in truth the relative standing of the three writings.

It is true that some of the later writings express the idea that the makers deem them necessary to clarify earlier ones. But I venture to deny that either the first or second writing need any clarifying. I venture to assert that none of the writings did any clarifying; that no material change was worked by any writing in a former one; that the last is no more controlling than the first and that in this case there is the common case of doing much needless writing, and yet leaving all that is written too clear for the need of interpretation on part of a court. A short analysis of each of the three writings will, I think, demonstrate this—will demonstrate that in all vital particulars each of the three writings makes like provision and clear provision.

In the first, the object is stated to be "to write for the future uninterrupted prosecution of the business of life insurance in which we are now or may be hereafter engaged and mutually associated. The second declares it is made in view of the fact that the past association of the makers and the manner of conducting their business has been "without the usual and ordinary incidents of a partnership," and is made "to more effectually define and determine our individual interest in said business in the future as between ourselves and in relation to all other persons, and to provide for the future uninterrupted prosecution of said business in which we are now engaged or may be hereafter associated." The only change, if it can be said to be one, which is made on this point by the third writing is that it has a more specific reference to an existing partnership than have any of the others. It recites "that the partnership between the undersigned is with the express and distinct understanding and agreement that all of the property heretofore acquired by the undersigned has been acquired as the result of said partnership, and that said property now belongs to the said partnership, including all profits of said insurance business, with the renewals to which the parties hereto may be entitled thereon." And it recites that each signer owns one-fourth of the stock in the corporation known as Fleming Bros., Incorporated. One part of the second writing makes specific reference to certain things that the parties shall own, by assigning and transferring "for the mutual benefit of the parties hereto" certain renewal commissions and "all commissions earned or hereafter to be earned, and all bonuses allowed, payable or to become payable in any manner, whether payable to or standing in the name of Robert J. Fleming, or any of the other parties to this agreement, * * * to be used, applied and disposed of in the manner only as herein agreed and provided for."

The third contract makes the first reference to the following fact:

"Said property now held and owned by the undersigned has been acquired by them with the understanding that it shall be disposed of as hereinafter set out," that said property includes certain real estate, and that it is purposed to acquire more by means of what will be realized from the joint business.

There are provisions which for convenience in further reference I will set out in a single-spaced group, denoting the writing in which the matter is found by a numeral in a bracket.

There is a declaration that the purpose is to fix and determine the interest of each and of all signers. [1]

It is distinctly understood and agreed by the parties hereto that they nor any of them have or can have any property rights 242 or money interests in said business other than that herein specified and defined. [1]

"In consideration of the services of each of us rendered or hereafter to be rendered in the business of life insurance, of the income to be derived therefrom, and of mutual stipulations herein con-

tained, each of the parties has and hereafter shall have only such share of their interest in the profits herein, renewals due or to become due under any and all contracts of insurance or commissions thereon to whomsoever nominally payable in the business of life insurance in which we are now or any of us shall be jointly engaged, as shall be actually received by each or shall be paid upon the order of each with the consent of the others from the general funds or income of said business." [2]

It is the intention of all the parties to this agreement and they declare that (neither) they nor any of them have or can have any property rights or money interest in said business other than that herein specified and defined so long as any of them shall be associated together in the business of life insurance. [2]

"And any sum or amount so paid shall fully represent the share and interest of each of the parties hereto at any time while any of the undersigned shall be associated together in said business or thereafter." [2]

What one who has deceased "has heretofore withdrawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein." [3]

It is further agreed that upon the death or withdrawal of any party hereto all his interest in said business and in the assets thereof shall thereupon cease and determine, and at no time shall any accounting be made or required as to any party hereto or their heirs, executors, administrators, survivors, or representatives. [2]

Upon the death or withdrawal of any party hereto all his interest in said business shall thereupon cease and determine (without right to accounting for the past). This is repeated. [1, 2]

The purpose is to bind survivors. [1] "Upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners which includes said stock in Fleming Bros., Incorporated, shall be and become the property of the surviving members of the said partnership." [3]

It is manifest that as to vital points each of the three writings in effect repeats. It is manifest that the three, read together, are the contract, and a clear-cut one. What the contract is is perfectly stated in the decree appealed from, to wit:

"Considering the terms of the agreements, it is clear they were made with an intent to establish a joint ownership of the property acquired by the brothers with a right of survivorship upon the death of a brother in the surviving brothers or brother. Such intent and purpose appear in every contract. * * * The intent of the parties to the instrument set out above is clearly to create an estate with the incident of survivorship."

There is no just right to construe. And as to the one point where most of the construing is being done the construction is an erroneous one. I refer to the part which I have set out single-spaced. That is where it is said over and again, and by repetition in different ones

of the writings, that the share and interest of one who dies is what he has drawn out while he lived. It is the part which the majority holds was not intended to be "literally" construed. It is the part of an unmistakably clear contract which the majority amends by means of "construction." The judicial amendment is this:

"This provision was intended to cover the immediate matters of each of the parties so associated and engaged in the business. Its purpose evidently was to forestall any extravagant tendencies on the part of any of the brothers, and to conserve the interest and profits of the business to the end that it might not suffer from extravagance and be continued uninterruptedly."

I repeat the words written are too plain to permit construction. The parties took great pains to say, and said most clearly and repeatedly, that they did not intend what the majority declares they did intend. I beg to add that the "literal" construction is demanded, because it is the only construction which is in harmony with the entire purpose of the contract. I mean by this that if it was the purpose to cut off inheritable interest and to give the share of one who predeceased to the survivor, it must have been intended that the only interest of the one dying first should be what he had received in life. For, if his interest is more than that, he will die seised of property, and it will not go to his survivor, but to next of kin or devisees, or both. In defining the interest and share to be what was received in life, the parties but recognized that they had contracted to cut off inheritable interest and to create a survivorship. I venture to say that is what they did contract to accomplish. There is no warrant for saying that the part defining share and interest is not to be construed literally. There is better reason for saying that that part of the writings is needless. Once agreed that neither party shall have an inheritable interest, once agreed that when one dies all that remains belongs to the survivors, and, without more, it has been agreed that the interest of each is measured by what he receives before he dies. So when it is all said and done, we have a clear contract that whoever died first left nothing to inherit, nothing for dower or marital rights to attach to; that at his death the title became complete and perfect in his survivors, and so on, until the last survivor was reached. As said, the only question is whether this is a lawful and enforceable contract. There is no question about what the contract is.

II. It may be conceded, for the sake of argument, that joint tenancy does not apply to "commercial enterprises," and that 243 neither in this state nor generally has it been recognized that such tenancies can be created as to "a commercial enterprise." But does that quite meet the situation. These parties attempted nothing as to their commercial enterprise. What they did do was to arrange concerning the moneys that might be realized from such enterprise. Such moneys are not a commercial enterprise, but are personal property. If the insurance business was closed out and abandoned, the contracts would still have for operation all they ever

had to operate upon. True, the inducement in the contract was the belief that the contract would tend to avoid interruption of the business. But the joint tenancy was in the property the business had or would get—the purpose that death of one, as it in the course of nature occurs once and again, should not disturb the business by means of the drawing out that must occur when there is no agreement to cut off inheritable interests and no survivorship contract. The joint tenancy was created to avoid all interruption by withdrawal of the earnings and property by deaths until the one death of the last survivor. I do not overlook that the majority goes a step beyond and holds that there can be no joint tenancy in property other than land. But in this I think it is clearly in error, and that no such rule prevails in this jurisdiction, or anywhere. In *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998, we enforce a contract creating survivorship, both as to lands and personal property. In *Stewart v. Todd*, 173 N. W. 619, we enforce a survivorship agreement to cut off inheritable interest as to lands and also against some \$18,000 worth of personal property.

III. The most definite ground assigned for the final conclusion is this: It is found that the relation between the parties was that of a partnership; next, that the provision creating survivorship as to the partnership property "is an attempt to make a testamentary disposition of the interest of each partner." Finally, that "an attempt to create a survivorship among partners is an attempt to make a testamentary disposition of the dying partner's property, or his interest in the partnership property, in favor of the surviving partner, to take effect after his death." As a ground for affirmance, this finding can have but one construction, to wit, that a partnership cannot enter into a contract of survivorship because it is a partnership, and, passing that, if a partnership does make such a contract, it amounts to an unenforceable testamentary gift.

I am of opinion that no partnership was created, notwithstanding that the writings at times refer to the relationship as being that. While I agree that there may be a partnership if there be either express or implied agreement to share losses, it is my view that these writings have no such agreement to share losses. But that aside, I submit that nothing in the law prevents the creating of a joint tenancy with its incident of survivorship on part of a partnership. So far as there is a rule on the subject, none are excluded from creating such a tenancy except "bodies politic or corporations." 23 Cyc. 484, point 3. And there is express authority, both here and elsewhere, that a partnership can do the thing, whatever its name, which cuts off inheritable interest and creates a survivorship. In *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530, it is held that where an uncle and nephew entered into articles of partnership to practice medicine, a provision in the partnership agreement that "in the event of death of the senior member of the firm all his property, personal and otherwise, which he held in partnership at the time of his death, shall go to the junior partner," should be enforced. One point made in the case was that it was a testamentary disposition

without the formalities of a will, and therefore incapable of enforcement in equity. Of necessity, the decision aforesaid overruled this point, and held, moreover, that the ruling could not be affected because the disposition was made in a partnership agreement as to partnership property. This is in harmony with our decisions that there is no unenforceable contract where a disposition agreed upon to take effect after death is not executed as a will should be, if the agreement rests on consideration. Surely, no one will challenge that the disposition made in the writings in this case has a consideration to support it. It seems to me that in *Stewart v. Todd*, 173 N. W. 619, we have disposed of the entire point contrary to the present conclusion of the majority. In that case we sustained this contract: The parties "have agreed to start a general store under the firm name (consisting of the name of the wife) in which each party is to be an equal partner." The husband "is to transact and do all business, sign the firm name to any and all papers necessary and all the property accumulated, purchased and owned by either party to be in the firm name, both parties to use any money they need and at the death of either party the one living shall fulfill all contracts, pay all debts and have all property left or owned by either party or in the firm name." We sustain the claim of the husband to survivorship under this contract, and included therein the real estate and, as well, a large amount of personal property.

The position of the majority is met at every essential point by the late case of *Smith v. Douglas County*, 254 Fed. at page 247 et seq., 165 C. C. A. 532. The matter cannot be better stated than is done in *Wood v. Logue*, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116, wherein we say:

"Laying aside the question as to what name or designation we shall apply to the transaction between the grantor and grantees, what good reason can be assigned in law or equity for the courts refusing to give it effect according to its clear intent?"

244 It is said that the title to property subject to ownership must vest in some one, an individual, individuals, or a legal entity. To be sure, that is so; but what is it relevant to, especially when it is also said that this property, when it came into existence, vested in these brothers, and that they became vested in these either as joint tenants or by placing title in a copartnership? This involves a repetition of the idea that there is a difference as to a partnership.

IV. One of the matters as to which it is difficult to say whether it be merely argument used as some sort of inducement, or a reason for affirming the decree below, is that part of the majority opinion which asserts, rightly enough, that, as a general proposition, estates in joint tenancy have in modern times ceased to be a favorite of the courts. Though true, how is this material if such tenancies are still recognized in this jurisdiction, and if therein contracts to create them may be specifically enforced in equity. If that be the state of the law in this jurisdiction, what purpose is served by those statements in the opinion which direct attention to the origin and character of joint

tenancy; that in its origin it was feudal; that some states have denied the existence of it except as to real property; that some states have abolished it altogether; and that some require strict proof thereof.

It may be conceded that in early decisions, among which is Hoffman v. Stigers, 28 Iowa, 302, is one that something was said to the effect that the estate of joint tenancy is not favored by our law. But when we consider the statute on tenancies, and its construction in cases much later than the Hoffman case and like decisions, such language in the early cases can mean no more than that there is such disfavor of such estate as that the proof thereof must be clear. The statute itself compels that interpretation, for it provides that conveyances to two or more in their own right create a tenancy in common, "unless a contrary intent is expressed." This must mean merely that a tenancy in common is presumed, and that the presumption will not stand if a contrary intent is expressed. We have expressly held that under this statute the estate of joint tenancy is permitted to be created, and that the only disfavor it stands in is that its existence must be clearly proved. We so held in Wood v. Logue, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116. In that case we say further that the qualifying words, "unless a contrary intent is expressed," leave a place in the law of the state for a joint tenancy, "with its characteristic incident of survivorship, if the intent of the parties to the instrument to create it is clearly indicated by the language employed." Here the agreement overwhelmingly demonstrates that the creation of a joint tenancy was intended. In the Logue case we held that such a tenancy had been created although the deed, standing alone, might convey the fee, and though the instrument was not drawn "with technical nicety nor the exactness of a learned professional conveyancer"—and this, on language very far from expressing such intent as clearly as the writings before us. About as much as this can be rightly claimed, too, for Baker v. Syfritt, 147 Iowa, 49, 62, 125 N. W. 998.

Nomenclature is, of course, quite immaterial. We so held in Wood v. Logue, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116. For we there held that the thing created, whatever its right name, was a joint tenancy which cut off inheritable interest and created a survivorship. Will any one venture to affirm that the writing in the Logue case more clearly or even as clearly evinced an intent to cut off the inheritable interest and to create a survivorship. So finding in the Logue case rests largely upon deduction and inference—sound, but still but deduction and inference. In the case before us the trial court that defeated the defendants also declared that purpose to cut off inheritance and to create a survivorship is clear beyond all doubt. And there is absolutely no room for either deduction or inference. For the provision in both the second and in the alleged controlling third writing we find this:

"It being the intention of all the parties to this agreement and they hereby declare that they nor any of them have or can have any property rights or money interest in said business other than that herein specified and defined, so long as any of them shall be associated together in the business of life insurance." [2]

"All right and interest in renewals and bonuses, no matter in whose name," is to be transferred for the mutual benefit of the signers "to be used and applied and disposed of only" in "the manner only" agreed on in the writing. [2]

"It is further agreed that upon the death or withdrawal of any party hereto all his interest in said business and in the assets thereof shall thereupon cease and determine (without accounting for the past). [2]

"Upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners which embraces all stock in Fleming Bros., Incorporated, shall be and become the property of the surviving members of the said partnership.

"And that what said decedent has heretofore drawn from said partnership shall constitute his sole and entire interest of his estate therein." [3]

V. The majority says:

"We are satisfied with the holding of the district court, and its judgment is affirmed."

But the holding of that court was not based on imperfect testamentary gift, and that court did not hold that the contracts did not clearly express an intention to create an interest that could 245 not be inherited, and which was to go to the survivors. The decree below is bottomed wholly on the conception that the contract is violative of sound public policy. I do not find that the majority places the affirmance upon that ground. And it seems to me it should not have been put on that ground by the trial court. The legislature is the supreme guardian of public policy, and whatsoever it approves is sound public policy. The statutes of this state in plain terms permit just what these defendants did. This court has so construed them. What the Legislature authorizes to be done cannot be violative of if sound public policy.

VI. It is true that, in a sense, each of the signers transferred things that might otherwise have been held by him severally to all of the signers. But that such assignment is permissible and merely tends to accrete the fund concerning which survivorship is created is one of the distinctions between a tenancy in common and a joint tenancy. While as a fiction of law each joint tenant holds all the property at all times, and that, ordinarily, there can be no recovery because the joint tenant uses all the property or its usufruct (23 Cyc. 490, *b*, 491, *d*), on the other hand, one tenant may maintain assumpsit against the other to recover his share of the property or its proceeds. *Stone v. Aldrich*, 43 N. H. 52. It follows that the survivorship agreement is not affected by the assignment of anything which the joint tenant owns as an individual, and that when he conveys his individual property under contract that a survivorship shall be created, concerning it, no right of dower attaches. *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646. In such cases he dies seised of nothing, and the majority concedes that the supreme test here is whether the husband of the plaintiff died seised of any of the things in which the plaintiff now claims an interest. As to personal

property, the right of disposal is absolute. We emphasize that in every possible way. See *Langworthy v. Heeb*, 46 Iowa, 64; *McDaniel v. Large*, 55 Iowa, 312, 7 N. W. 632; *Mallory v. Russell*, 71 Iowa, 63, 32 N. W. 102, 60 Am. Rep. 776; *Paige v. Paige*, 71 Iowa, 318, 32 N. W. 360, 60 Am. Rep. 799. We have held that the share of the widow in personal property cannot be enlarged by treating property parted with by the husband as an advancement to children as still part of the personal property of which the husband died seised. *Burgoon v. Whitney*, 121 Iowa, 76, 95 N. W. 229. The power to dispose of the personalty is absolute (*Lunning v. Lunning*, 168 N. W. 140), and it would seem not to matter with what intent the husband parts with such property (*Metler v. Metler*, 19 N. J. Eq. 457).

This has its bearing, too, on the question of public policy. The very fact that the statutes restrain the alienation of real property while permitting it absolutely as to personal property shows that disposition of the latter by such an agreement as the one at bar is not against public policy. This answers, too, what the opinion is moved to say upon the fact that the wife is the weaker vessel, who maintains the home and rears the children, and is entitled to have provision made for her by law. Both the best and the poorest wife is entitled to such provision. But even the best wife is entitled to no more than such provision as the Legislature has seen fit to make for her. Conceding everything to the quality of the plaintiff as a wife, that throws no light on whether this contract, signed by her husband, is or is not enforceable. See dissent in *Younker v. Susong*, 173 Iowa, 689, 690, 696, 156 N. W. 24, and dissent of Mr. Justice Marshall in *Hall v. City*, 128 Wis. 132, 107 N. W. 31, 37.

VII. Speaking by way of summary:

(a) We held in the *Logue* case, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116, that it is unnecessary to give the arrangement a name; that nomenclature was immaterial. We said:

"Laying aside the question as to what name or designation we shall apply to the transaction between the grantor and grantees, what good reason can be assigned in law or equity for the court's refusing to give it effect according to its clear intent?" that that intent was the granting of a unity of title with right of survivorship, and that the grantor had a right to prefer such an arrangement to "a tenancy in common with the ordinary incidents to such an estate."

(b) In joint tenancy neither of the successive survivors receives anything by inheritance from the deceased cotenant, and his title is derived solely and directly through the deed which created the tenancy. And the one who dies first does not die seised of any inheritable interest. And the last survivor becomes "the sole and unqualified owner." *Wood v. Logue*, 167 Iowa, at 436, 442, 149 N. W. 613, Ann. Cas. 1917B, 116. And such a contract is sanctioned by Iowa law. It is the essential distinction between an estate in common and a joint tenancy. And in the absence of statute the survivors take the whole estate free from any charges on the property made by the deceased cotenant. 23 Cyc. 488, 489.

(c) Dower cannot attach to the estate of a joint tenant where, as

in this case, his estate remains joint until his death, and this because his estate is not an estate of inheritance. It follows that decedent neither possessed in his lifetime nor died seised of any estate to which a dower interest in plaintiff could attach or inhere. He merely departed from the estate at his death. Code, §3366; 14 Cyc. pp. 901, 902, 1891, 1895, 1896.

My understanding is that the majority approves this much. All it fails to do is to make the approval effective.

246 (d) A joint tenancy may be created "by any conveyance or act of purchase inter vivos which gives an estate to a plurality of persons, where there are no restrictive, exclusive or explanatory words." 23 Cyc. 483, *b*.

(e) It is not the law that joint tenancies can be created as to land only, nor that they cannot be created by a partnership as to partnership property, either personal or real. In *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530, it is held that inheritable interest may be destroyed and a survivorship created in all property "personal and otherwise," held in partnership when the senior partner dies. And that is the holding of *Stewart v. Todd*, *supra*.

(f) It is not the law that a contract like the one at bar fails for being a testamentary gift, for, though not executed with the formalities of a will, it is saved because it rests on consideration. *Stewart v. Todd*.

(g) Speaking to the rule generally, I find a pronouncement in 23 Cyc. 483, *a*, that "a joint tenancy exists where a single estate in property, real or personal, is owned by two or more persons other than husband and wife under one instrument or act of the parties."

(h) There is no difficulty about construction here. The writings either clearly create a joint tenancy or they do not. The whole test whether they do create one is an inquiry as to whether four elements coexist, to wit:

- (1) Unity of interest.
- (2) Unity of title.
- (3) Unity of time, except as modified by the statute against perpetuity.
- (4) Unity of possession.

That is to say, each owner must have one and the same interest conveyed by the same act or instrument to vest at one and the same time, and each must have the entire possession of every item of property held in joint tenancy as well as the whole. 23 Cyc. 484, 485. It follows that as to estates held in joint tenancy no right of dower will attach. *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646; *Park on Dower*, 37; *Scribner on Dower*, 269; 4 *Kent's Com.* 37.

247 In the Supreme Court of Iowa, June 30, 1920

Supreme Court No. 32408

[Title omitted]

Appeal from Polk District Court

SUBMISSION OF CAUSE

This cause is submitted on Appellant's petition for rehearing and resistance on file and oral argument of counsel for the petitioner. SR 31-270.

Ordered by the Court and entered of record on the 30th day of June, A. D. 1920.

A True Copy.

Attested:

B. W. Garrett, Clerk of Supreme Court.
[Seal of the Supreme Court of Iowa.]

248 & 249 In the Supreme Court of Iowa

ANNA B. FLEMING

vs.

ROBERT J. FLEMING et al., Appellants

Appeal from Polk District Court

JUDGMENT RECORD ENTRY ON REHEARING

In this cause, the Court being fully advised in the premises, file their written supplemental opinion sustaining their former opinion filed herein, Affirming the judgment of the District Court, and overruling appellant's petition for rehearing.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed, and that a writ of proce-
dendo issue accordingly.

It is further considered by the Court that the Appellants pay the costs of this appeal, taxed at \$—, and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court, filed on the 20th day of December, 1920, in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 15th day of December A. D. 1922.

B. W. Garrett, Clerk of Supreme Court.
[Seal of the Supreme Court of Iowa.]

(No. 32408)

FLEMING

v.

FLEMING

OPINION ON REHEARING

1. Wills *58 (1)—Contract between brothers who incorporated insurance business equivalent to contract to make will.

Where four brothers agreed to devote their time to an insurance business as a common enterprise, which was incorporated, each receiving his pro rata number of shares of stock, which they indorsed and placed in the safe together, the interest remaining to each was an estate descendible as such under the statute, subject only to the incumbrance created by their contract that on the death of any member the property held by the associates was to become that of the survivors, which contract was analogous and equivalent to a contract to make a will, and not effective to pass a present estate in any particular property..

2. Wills *11—Contract between associates that survivors should take ineffective as against widow of one.

Contract between four brothers who incorporated insurance business, equivalent to contract to make will, that on the death of any member the property held by the associates was to become that of the survivors, held ineffective, under Code, § 3376, as against the widow of one of the brothers, deceased; he not having sold his interest during his lifetime nor transferred it gratuitously.

3. Wills *59—Agreement of associates for survivorship supported by consideration of mutual promises.

Mutual promises of brothers, who incorporated insurance business, that on the death of any member the property held by the associates should become that of the survivors, held sufficient consideration to support such contract as between the parties to it, though there was a partial failure of consideration through the contract being unenforceable as against the widow of one of them, deceased, entitled to her statutory rights in the estate.

Salinger, J., dissenting.

*For other cases see same topic and key number in all key-numbered digests and indexes.

Appeal from District Court, Polk County

C. A. Dudley, Judge

On Petition for Rehearing. Petition Overruled

For former opinion, see 174 N. W. 946.

EVANS, J.: The justices concurring in the majority opinion heretofore filed are still satisfied that the case was properly decided. Because of some features of the argument in support of the petition for rehearing, we are disposed to add to the former opinion this further word of discussion:

The facts are sufficiently stated in the original opinion, and we shall not repeat them here.

We adhere to the view that the theory of joint tenancy in a common-law sense is not available to carry the appellants any further than the terms of their contract carry them.

If this contract by its own terms was effective to divest each of the contracting parties of his estate and to transfer the same to the survivor of them, then it were needless to say that a joint tenancy was or was not created.

If, on the other hand, the contract by its own terms was not effective to that end, then it was not effective to create a joint tenancy in the common-law sense. If the contract had purported in 251 terms to create a common-law joint tenancy, a somewhat different argument would obtain at this point. It did not do so. On the contrary, is purported in terms to create a partnership. In determining the effect of the contract, therefore, we cannot add to its terms the legal fiction involved in a common-law joint tenancy. To do so would be to assume a joint tenancy as a major premise in order to prove it as a conclusion.

To put it in another way, the typical case of joint tenancy is ordinarily created by grant of a third party. It involves no necessary contractual relation between the joint tenants. In this case the alleged joint tenancy was not created by act of any third party. It was created, if at all, solely by the contract of the alleged joint tenants. Assuming for the purpose of this discussion that a joint tenancy may be thus created, it would be nevertheless a status created by the "contract" of the parties and not otherwise. Whatever the rights thus created, they must be determined in obedience to the contract and to nothing else. In the last analysis therefore we have before us a "contract"; nothing more, nothing less. Being a contract, it may be enforced as such unless there be some legal impediment thereto.

[1] Looking at this contract, what is its general nature or classification? Is it testamentary? Is it the equivalent of a contract to make a will? Is it a sale contract? Does it transfer property from one party to another? Does it obliterate the beneficial right and equitable title of any or all of the parties, to the property which is

the subject-matter thereof, and which in the absence of contract would be owned in common by all? Notwithstanding the contract, did the parties thereto still remain the beneficial owners of the property involved? Manifestly no party to the contract could thereby be divested of his beneficial interest in the property except by the transfer of the same to some other party. By a series of instruments the four parties conveyed their legal title to a corporation organized by themselves as exclusive stockholders. Each received his pro rata number of shares of stock. Thereupon each purported to transfer his shares by indorsement and delivery. To whom did he indorse and to whom did he deliver? There was no transferee and no taker of delivery. They all put their shares into a common receptacle and locked them in the safe to await eventualities. The property still remained in the dominion of the same parties. Its benefits still accrued to them. No fifth party had acquired any interest in or incumbrance thereon. The property rights of the four parties respectively, whether legal or equitable, were mutual and exactly equal. If they had then attempted a partition as between themselves, each must have received his one-fourth thereof. In some respects the contract on its face attempted the impossible. It attempted to dispose of the respective interests of the partners and yet to retain the same; to do and yet not to do; to give and yet to withhold. In the nature of the case such contradictions are not enforceable. The net result is that the equitable and beneficial ownership of the joint property, thus manipulated, remained, and that the equitable or beneficial interest thus remaining to each party to the contract was an "estate" within the meaning of the law and was descendable as such in accord with the statute, subject only to the incumbrance created by the contract itself. The contract in question was therefore analogous to and fairly equivalent to a contract to make a will, and only in that character can it be given effect. It was not effective to pass a present estate in any particular property. Nor did it operate as an incumbrance upon particular property during the lifetime of decedent, whether owned jointly or in severalty. Its obligations were necessarily suspended as to each partner during his life. It became enforceable as an incumbrance, if at all, against his estate; after his death, and not before.

[2] The result is that the decedent left an estate; and the contract must be deemed to operate as a claim or incumbrance upon it either in part or in its entirety, in the same manner as a contract to make a will. Though therefore the contract he deemed enforceable as one to make a will, the question remains: Is it effective as against the widow of the decedent?

If in the absence of a contract the deceased partner had made a will disposing of his property to his brothers in the manner described by this contract, doubtless it would not be claimed that such will could be effective as against the widow.

Code, §3376, provides:

"The survivor's share cannot be affected by any will of the spouse, unless consent thereto is given," etc.

We have held that this section of the statute is applicable to personal property as well as to real estate. *Ward v. Wolf*, 56 Iowa, 465, 9 N. W. 348; *Linton v. Crosby*, 61 Iowa, 401, 16 N. W. 342; *May v. Jones*, 87 Iowa, 188, 54 N. W. 231; Code, § 3362. The statute therefore is an impediment to the operation of the husband's will upon his estate in such a way as to deprive the widow of her distributive share of either the personalty or the realty.

The question still remains whether the fact that the husband during life contracted to make such a will, will avoid the operation of section 3376. May the wife assert the impediment of the statute against the operation of such contract? If the statute disabled the husband from making a will detrimental to the wife, could 252 the husband nevertheless make a valid contract obligating him to make such a will? Doubtless it were more accurate to say, not that the husband was disabled from making the will, but that the operation and effect of his will would under the statute be subject to the consent of the widow so far as her distributive share was concerned. A contract to make a will would be fully performed by the making of the will. Would the operation and effect of such will be subject to the provisions of section 3376? We answer yea. Though in this case no will was in fact made, the contract could nevertheless be enforced to the same extent as though the will had been made and not otherwise. The enforcement of the contract is subject to the limitations of the statute because the will itself would be subject thereto.

We are not unmindful that during the lifetime of the decedent there was no legal impediment to his disposing of his personal property. He could have sold it; he did not sell it. He could have transferred it perhaps even without consideration; he did not transfer it. There was no transferee. At this point we are not concerned with forms. We look to the substance of the property rights of this decedent. Though in form he transferred all his property to the corporation, he was the joint creator of the corporation and owner of one-fourth thereof. Though each of the four parties transferred his stock in severality to all of them jointly, and thereby changed the form of his property right, he still owned the substance thereof. This is not saying that the contract was void and of no effect as against the decedent's estate. It is only saying that it is not effective to defeat the widow's right to her distributive share.

Construing and applying the statute broadly (sections 3362, 3376) to the purpose of its enactment, it leaves no opening for ingenuity to enable a husband to remain during life in full dominion of his property and yet to dispose of the same after death to the exclusion of the widow from her distributive share.

Personal property, it is true, would be subject to the good-faith indebtedness of the husband; but, as against the widow, it would not be subject to a mere scheme to absorb it. This does not imply that these brothers had a conscious purpose to wrong any surviving widow. Doubtless their only active purpose was to create the enterprise and to draw upon it for the care of all who were dependent upon them either severally or jointly. Though the contract im-

posed upon them no obligation in respect to any surviving widow, the surviving partners do recognize an obligation either moral or legal to care for the plaintiff as such surviving widow and they offer to provide her generous support. But the specific motive is not controlling. The right of a widow to her share of the estate, whether legal or equitable, owned by her husband at the time of his death, is impregnable; or it is not existent at all. This right does not arise out of any contract. Nor can she be required to accept generosity, however princely, in lieu of it.

[3] II. In our foregoing discussion we have assumed that the mutual promises were a sufficient consideration to support the contract as between the parties. It must be noted, however, that these mutual promises all carried the same infirmity. Each and all were assailable upon the same ground as for failure, or partial failure, in that more was promised than could be performed. If this decedent had survived his brothers and had sought to enforce their promises, he would have encountered the same impediment as they have encountered here. So that the performance permitted here is as full as the consideration is valid. By their very nature, the mutual promises were exactly equal in value as mutual considerations. Between performance and consideration, therefore, there is complete mutuality in that the one is the full measure of the other.

Performance is partial because the validity of the promised consideration was only partial. The partial failure of consideration would be a just ground of offset against full performance. No legal damage accrued therefore even as against the decedent or his estate. In assuming the validity of the consideration of the contract, therefore, we do so with this qualification.

This opinion is supplemental to the original opinion and is not a substitute therefor. One reason therefor is the vigorous attack made upon the original opinion as being in conflict with *Stewart v. Todd*, 173 N. W. 619. The opinion in the latter case and the original opinion herein were both written by the late Justice Gaynor. No reference was made in the original opinion herein to the *Stewart Case*. An examination of that case will readily show how little occasion there was that such reference should be made. The contract in that case was one between husband and wife, and its enforcement was sought and obtained by the surviving husband as against the collateral heirs of his wife. The question whether a contract for his entire estate after death, between the deceased spouse as grantor and a third party, is subject and inferior to the statutory right of the wife, or husband, was in no manner involved therein. Such is the controlling question in this case. We find no conflict in the two opinions.

The petition for rehearing is overruled.

DISSENTING OPINION ON REHEARING

SALINGER, J. (dissenting): I. The majority declares:

"The justices concurring in the majority opinion heretofore filed are still satisfied that the correct result was announced in such opin-

ion. The argument in support of the petition for rehearing 253 indicates a misconception of the reasons which have impelled us to this result. For this reason, we are disposed to add to the former opinion this further word of argument."

Even if one note but part of the well-made attacks upon said opinion, he will find that counsel have not misconceived it, and that it should not have the foregoing approval.

(a) That opinion urges against the contract defendants have, that it deals with personal property owned by a partnership. Such holding is bad law and conflicts with our own and other decisions. In *Stewart v. Todd*, 173 N. W. 619, we sustain such a contract though its subject is confessedly partnership property, including personal property. In *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530, the contract enforced deals with nothing but the personal property of a partnership. While *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998, involves no partnership, it does uphold a survivorship agreement that deals with property both personal and real. And see *Smith v. Douglas County, Neb.*, 254 Fed. 244, 165 C. C. A. 532.

(b) One argument of the opinion is that a "commercial enterprise" cannot "be affected by a joint tenancy." This is irrelevant and fallacious, because the contract gives rights even if it were true that such enterprise may not so be affected, and because this contract deals, not with a commercial enterprise, but with future accumulations of that enterprise. As well say that money received from land is not personal property because the source is real property.

(c) It not only "construes" what needs no interpretation, but it erroneously interprets plain words away. The contract says, repeatedly, that each signor and his estate shall, unless he be the last survivor, have no interest in or rights to the partnership property, "except such share * * * as shall be actually received by each or shall be paid upon the order of each with the consent of the others from the general funds or income of said business." The opinion declares that this is not a limitation upon inheritance rights, but merely a provision to guard against extravagance. This not only disregards the plain words of the contract, but is against reason. In such a contract as this the share of any who die first is necessarily limited to what he has drawn in his lifetime. If all that belongs to him passes to another on his death, all he can have is what he has already obtained. He can add nothing to his estate after he has died.

(d) There should be no approval of the pronouncement that "estates in joint tenancy have in modern times ceased to be in favor with the courts." The statute sanctions such tenancies. See *Wood v. Logue*, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116. At mildest, this is a declaration that the law of the land may be disfavored by the courts.

II. The "supplemental" opinion must be tested by itself. It neither supports nor is it supported by the original opinion. The

"supplemental" opinion is neither a supplement nor a "further word of argument." The original does not touch what the supplemental one advances.

The majority says:

"In the last analysis, therefore, we have before us a contract; nothing more, nothing less. Being a contract, it may be enforced as such unless there be some legal impediment thereto"—and then elaborates matter utterly irrelevant to the issue so stated.

This shows that the only material question has been forgotten for the time being—and it tends to explain why the true issue seems not to have been determined at all.

What does it matter that "in determining the effect of the contract we cannot add to its terms the legal fiction involved in a common-law joint tenancy," or that "the alleged joint tenancy was not created by act of any third party, but was created, if at all, solely by the contract of the alleged tenants," or that the contract does not purport "in terms to create a common-law joint tenancy." Surely, it cannot matter "that the theory of joint tenancy in a common-law sense is not available to carry the appellants any further than the terms of their contract carry them." If they are entitled to relief to the extent to which "the terms of their contract carry them," it cannot matter how many things exist which give them no relief.

In a word, here is no question of names. No dictionary can rightly decide this suit. Rights ought not to be denied because there is a quarrel over the name of the rights, nor because immaterial things may or may not be done. As said in *Wood v. Logue*, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116:

"Laying aside the question as to what name or designation we shall apply to the transaction between the grantor and grantees, what good reason can be assigned in law or equity for the courts refusing to give it effect according to its clear intent?"

And see *Rood, Wills*, § 53.

III. It is stressed that the four signers created a corporation with themselves as sole shareholders each receiving his pro rata in shares, and that thereupon each purported to transfer his shares by indorsement and delivery. The preface of the court is:

"We are not concerned with forms. We look to the substance of the property rights of this decedent."

But is that done?

The plaintiff declares over and again that this corporation and these shares were and remained the property of the partnership and her husband died seized "of an undivided interest in all the property of the partnership, which partnership property includes all the

254 capital stock and property" of said corporation. So, then, creating the corporation and so issuing and dealing with the shares is nothing but a change of form. It should not be seriously contended by those who profess to disregard mere change in form that anything material was effected. If four partners conclude to symbolize hardware owned by the partnership by stock certificates issued to the partners, the rights of each in the hard-

ware remain unchanged. The share certificate represents the hardware. I agree with the majority that—

"The property still remained in the dominion of the same parties. Its benefits still accrued to them. No fifth party had acquired any interest in or incumbrance thereon. * * * If they had then attempted a partition as between themselves, each must have received his one-fourth thereof."

But I cannot follow it in forgetting the effect of its statement. That effect is that the mere creating of the corporation and issuing said stock has no bearing at all upon the contract rights of the parties.

As to the inquiry, "to whom did he indorse and to whom did he deliver," and the statement, "there was no transferee and no taker of delivery, they all put their shares into a common receptacle and locked them in the safe to await eventualities," I have to say I shall later attempt to show that all this is immaterial. It foreshadows a position more fully developed by the majority elsewhere, and is indicative of the thought that there was no delivery of the stock shares. It may well be said that these shares were in the possession of all four of the contracting parties as long as they lived, and on the death of one these continued in the possession of the survivors, and that the deposit of the stock nominally in the deceased member and the assigning by him in blank amounted to a constructive delivery by him at the time he executed such assignment. But I need not pursue this now. The most the argument of the majority comes to is that the creation and assigning of the shares effect nothing because delivery was lacking. If that be granted, then the issuance and attempted transfer of the shares comes to nothing. The net result in law is that each partner retained the same interest in the partnership property as if no corporation had been created by the partnership and nothing whatever had been done by the corporation. In no view was more change effected in partnership rights than if the partnership had retired from business and put all the accumulations therefrom into government bonds. All that would accomplish is that a share in business accumulations would become a share in government bonds.

IV. But, as already indicated, lack of delivery, the retention of joint possession, and the preserving equal access to each partner are amplified in another branch of the argument of the majority. The sum of that argument is that somehow this suit is affected by lack of disseizin of one contracting party, and by failure to deliver to and vest in the other party, and that there is fatal uncertainty as to where title is lodged. It is an argument that has made much bad law, on so-called contingent remainders. Can it be possible that a contract of survivorship wherein several agree that the one last remaining alive shall have all the property of the others is in any way affected by delivery, disseizin, and vestiture? If that be so, it is inexplicable why a survivorship contract was ever upheld. For in each and all the cases of such contracting no party was disseized, no party was vested with title to what he did not already own, and neither party delivered anything to the other except the contract

itself. In each and all of such cases each contracting party kept full control of and access to the individual property of his that had been made the subject of the contract. In each of them it could have been said, "There was no transferee and no taker of delivery." And what an absurdity it would be to require mutual delivery in such cases. A. owns 10 horses; B. also owns 10. Can they make no effective agreement that the survivor shall have all that remain of the 20 unless when the parties sign each delivers his 10 horses to the other? To follow that to its end, the moment the exchange was made it would seem to become necessary to keep on transferring and retransferring. Must one who puts his farm into a survivorship contract deliver his farm at the time when he executes the contract?

In the supposed case of the contract where each party has 10 horses, will it invalidate the contract because both parties had free access to both sets of horses and, for that matter, if they both have control of both sets? In the Stewart general store case, not an item of the stock was ever delivered into the sole control or possession of either party to the partnership contract. Every item was at all times as much under the control and in the possession of one partner as of the others. There was never a moment when one party did not have equally full access to everything belonging to the partnership. The benefits of the existence of the general store "still accrued" to both contracting parties. It was true there, too, that no party other than the ones contracting "had acquired any interest or innumbrance thereon." There, as here, if the parties had attempted partition as between themselves, "each must have received his one-fourth ($\frac{1}{4}$) thereof." It is true that in all cases of contract of survivorship, (in the sense the words are used by the majority) "they all put their shares in a common receptacle and locked them in the safe to await eventualities." That is to say, in the Stewart Case the joint property was kept in the common receptacle, the partnership store, and kept there even as 255 things are kept in a safe, to await the eventuality, the death of one partner, on the happening of which the property would be removed from the common receptacle where it was constructively locked up and be given to the survivor. In the Stewart and in all like cases, just as here, the property "still remained in the dominion of the same parties." It was true there, as here, in the sense that the majority uses the words here, that "there was no transferee and no taker of delivery." As said, no survivorship contract should ever have been upheld if here is the true theory, because not one could meet the test now formulated. Their very essence is that benefits and dominion shall be temporarily retained with access and control, and that the final vesting of title must wait the happening of the contracted-for eventuality. There is title in all the parties subject to the contract limitation that the last survivor shall have sole title.

V. It is not unknown in the law that title vests even though full use and enjoyment be postponed, and even though it may not, at the instant when title is said to vest, be known with definiteness who will ultimately have full title. Here, there was an agreement that the

survivor should have "the property then owned by the said partnership which should be and become the property of the survivor member of the said partnership." I think it is not straining to say that, if vesting and divesting were material, each partner was so divested and each other so invested as that the title remained inchoate in the four until three had died, and that then full title vested in that survivor. We held in *Wood v. Logue*, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116, that the last survivor becomes the sole and unqualified owner. Let me repeat that, if divesting and vesting be essential, there was the same flaw in every case wherein survivorship contracts have been upheld.

In *Allbright v. Hannah*, 103 Iowa, at page 102, 72 N. W. at page 422, the contract was that the plaintiff should have certain lands upon the death of one Remey, or when Remey and his wife were done with it, and we said that this "was either the present transfer of the fee, subject to a life estate, or an agreement to will the property to the plaintiff," and that, whichever it may have been, "it was good if plaintiff accepted it and acted thereon, and took possession of the land thereunder." This may not fit the present discussion with absolute exactness, but it does settle that for the purposes of sustaining survivorship contracts that may be deemed a present transfer of the fee which for some purposes is not deemed to be such transfer.

Recurring to the uncertainty as to who will be the ultimate owner or beneficiary, that difficulty, too, was present in the cases wherein contracts such as this have been held to be valid. In *Wood v. Logue*, and in *Stewart v. Todd*, it was as uncertain who would get full title by becoming the last survivor, as it was uncertain when the contract at bar was signed which of the four brothers would live the longest.

On the reasoning of the majority, what this court has held as to contingent remainders is bad law, and there is no defending such decisions as that in *Woodard v. Woodard*, 184 Iowa, 1178, 169 N. W. 464, and the numerous decisions therein cited in support. In that case it was contended that when the will was executed it could not be known what great-grandchildren would be in being when the time for ultimate transfer and vesting arrived, and that therefore the remainder was a contingent one. We answered that when said will was executed named great-grandchildren were in being with present capacity to take; that therefore, though it could not then be known that any of these great-grandchildren would be living when the life estate in the grandchildren lapsed, or that later born ones would not then be in esse, yet the remainder was vested; and we said that—

"Unless something not yet discussed avoids it, the great-grandchildren took title on the day the testator died."

The effect is that there was a vesting in the class known as great-grandchildren though no one could tell who, if any one, would be in the class when the time for distribution came. On this line of decisions it follows title was sufficiently vested in each of the brothers, because it was agreed that one of the four in their class should at

some time have full title; and the fact that it could not then be known which one in the class would be such ultimate beneficiary does not prevent a sufficient vesting of title in the class.

VI. I take it on the authority of *Stewart v. Todd*, that, assuming the contract here to be on sufficient consideration, it would be enforced against heirs. If then it is not enforceable, it must be because the wife of a party to this contract is attacking it. I have already attempted to show that when Charles died his interest in the partnership property was incumbered, or perhaps it is more accurate to say he had parted with it conditionally, to wit, on the condition that it should go to the last survivor. If that be sound, his wife took no more than an heir could because there was nothing for either to take. On that reasoning the case would stand precisely as if the husband in his lifetime had for a sufficient consideration made a conditional sale of his property, with delivery to be made when he died—or as if, though he died seized of it, it was mortgaged to its full value. It is manifest that in such case the widow could take nothing.

It seems to me the whole controversy at this point is disposed of by the single pronouncement in *Mayburry v. Brien*, 15 Pet. 21, 10, L. Ed. 646, wherein the Supreme Court of the United States ruled that "the mere possibility of the estate being defeated by survivorship, prevents dower" from attaching. I repeat that, if the contender were other than the wife, no one would pretend to say that this contract is not enforceable; and I add it is immaterial that the wife is attacking, because the act of her husband in his lifetime worked that no marital rights attached to the property in question at the time when the husband died—that he died seized of nothing.

Since it must be conceded that decedent in his lifetime had the right to give his property away or to sell it for any price that pleased him (*Lunning v. Lunning*, 168 N. W. 140; *Metler v. Metler*, 19 N. J. Eq. 457), it would seem that the death of the seller could not deprive a purchaser from him of property sold to him to be delivered after death, merely because decedent had been more provident than is one who throws his property away or parts with it for an insufficient price. One can contract as to what shall be done after he dies. *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530; *In re Neil*, 35 Misc. Rep. 254, 71 N. Y. Supp. 840, and *Page, Cont.* § 397. If there be the right to sell if he yield possession, the sale must surely be as effective where, in addition to the purchase price, he demands and obtains the additional privilege of using the property without cost to himself until he shall die. If, had he not exacted this additional benefit, the property was lost to his wife, how can it be retained for her because he obtained an enlargement of the price by the retention of possession?

VII. This brings me to the major argument now made by the court. It rests upon a perfectly sound premise, to wit, that the husband may not by will cut off the distributive share of the wife. The unsound deduction from this sound premise is that the defendants stand as if they were seeking to assert a will against the distributive share of the plaintiff. The argument is this: (a) This is a com-

tract to make a will which has been breached. (b) Whosoever such an agreement is made and broken, the remedy of the party not in fault is that he is to be treated as if the will agreed to be made had been made; and he must be dealt with as one basing his rights upon a duly executed testament. I answer, first, that whatever may result where a contract to make a will is made that is immaterial where no such contract was made, and that here there is no thought of making an agreement to make a will, and no such contract was made. And whatever may result from the making and breaking of a contract to will it does not result here, because the contract here is the permissible agreement that the future rights of the parties shall be based on the fact of survivorship (17 Am. & Eng. Encyc. Law, p. 65)—was a lawful stipulation as to what should at the death of all but one be done with the accumulations the parties were then engaged in creating. Said text states on the authority of *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202, *Pritchard v. Walker*, 22 Ill. App. 286, and *Jones v. Cable*, 114 Pa. 586, 7 Atl. 791, that the fact that survivorship is no longer regarded as an incident of joint tenancy does not invalidate contracts which definitely provide that future rights of contracting parties shall be based on the fact of survivorship, and that—

"Although the right of survivorship as an incident to joint tenancies be abolished by statute, it may nevertheless be given by a will or deed, either expressly or by necessary implication, and that such a statute does not prohibit contracts that make the rights of the parties dependents upon survivorship."

VIII. But assume that here is a broken contract to make a will, does it follow therefrom that this creates a will, and that therefore these defendants are in the position of seeking to deprive the distributive share of a widow by what amounts to an attempt to take it from her by will? That can be true only if on breach of a contract to will a will results. Such a contract, though broken, remains just a contract, and the remedy on breach is a complaint of the breach, with demand for damages, quantum meruit, or other remedies allowed for breach of contract. *Hammerstein v. Thompson*, Clark & F. 245; *Henry v. Rowell*, 31 Misc. Rep. 384, 64 N. Y. Supp. 488; *Leahy v. Campbell*, 70 App. Div. 127, 75 N. Y. Supp. 72; *Furman v. Craine*, 18 Cal. App. 41, 121 Pac. 1007; and 1 *Schouler, Wills* (5th Ed.) §§ 452-454; *Allbright v. Hannah*, 103 Iowa, 101, 72 N. W. 421. Or the remedy may in some cases be recovery of the value of what claimant has given for the promises. *Frost v. Tarr*, 53 Ind. 390; *Shakespeare v. Markham*, 10 Hun. 311. Or quantum meruit. *Taylor v. Wood*, 4 Lea (Tenn.) at page 510; *Jincey v. Winfield*, 9 Grat. (Va.) 708; *Beach, Cont.* p. 786; 2 *Elliott, Contracts*, p. 454, note 20. Both as to substance and remedy such a contract is but a contract—never a substitute for a "will." 3 *Elliott, Cont.* pp. 218, 797; 1 *Beach, Contracts*, p. 487; *Bishop, Cont.* 516, 518; *Page, Contracts*, p. 2466. "There is nothing peculiar about contracts to make provisions by will. An actual contract must be shown. The parties must have been competent. Their minds must have met on a certain and definite agreement, unless the facts imply a promise which would sustain an action on quantum meruit." *Rood, Wills*, § 54.

The inquiry of the majority whether the agreement here be "the equivalent of a contract to make a will" is then an immaterial inquiry; for, if it be conceded to be such contract and to have 257 been breached, not a step is taken towards putting these defendants in the position of one who is basing his rights upon a testament. As said in *Stewart v. Todd*, 173 N. W. at page 621, where it is true that the writing cannot be enforced as a testamentary instrument, it may if on consideration be enforced as a valid and binding contract. To the same effect is *Baker v. Syfritt*, 147 Iowa, 65, 125 N. W. 998. This means that a will can be a contract, too. But though a will may sometimes be dealt with as a contract, and though a deed or other paper executed as a will may be a testament, even if not in the usual form of wills, it has never been held that a contract to make a will or any other contract which is not executed with statute formality can be substituted for a will or be treated as being a will, either for the purpose of attack or of defense. The court may not manufacture a testament and thrust it upon a litigant and thereupon deny him rights upon the ground that he has no rights were he basing them upon a will. No writing which lacks the statute attestation is a will for any purpose. An attempted will which fails to be that because not executed as required by statute may be evidence to establish the existence of a contract to give, but is not and cannot be a testament. It ever remains a contract only. *Studer v. Seyer*, 69 Ga. 125; *Walpole v. Orford*, 5 Ves. Cr. Rep. 402. That is so true that it has been held that contracts to make a will are not entitled to probate because "contracts cannot be probated." *Rood, Wills*, § 51a. And the courts have gone so far as to deny probate to instruments that were wills because they were executed in pursuance of a contract such as made the will irrevocable. Sir John Nicholl said: This very irrevocability "destroys the very essence of the will and converts it into a contract, a species of instrument over which this court has no jurisdiction." And see *Rood, Wills*, § 52, and *Hobson v. Blackburn*, 1 Addams, 274, 275; *Schumaker v. Schmidt*, 41 Ala. 454, 4 Am. Rep. 135; and *Anderson v. Eggers*, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570.

Because of this very remarkable pronouncement by the majority, this point, that here there is no will, cannot be overemphasized.

IX. Availing itself of the statement that up to a certain point sufficient consideration has been merely assumed, the majority finally declares that there is something defective in the consideration.

It is not denied that mutual promises may be a sufficient consideration. It cannot be denied that here there were mutual promises, for the contract recites that the consideration is "the service of each of us rendered in the business of life insurance or of the income to be derived therefrom and of mutual stipulations herein contained." It is not denied that such a writing imports a consideration. It cannot be denied that such service was rendered. What is intended is a claim that the contract is injuriously affected because complete performance of part of the mutual undertakings is impossible. It is said:

"In some respects the contract attempts the impossible. It attempted to dispose of the respective interests of the partners and yet to retain the same; to do and yet not to do; to give and yet to withhold. In the nature of the case such contradictions are not enforceable."

I have said all I can about the alleged impossibility of performance. That assertion of impossibility is but a repetition of the assertion that no contract can work to deny this widow a distributive share, and that no attempt has been made to do so except to assert a will. If these be not sound positions, there is no impossibility.

9a. Upon the alleged impossibility rests a claim of partial failure of consideration. There is no such issue in the case. It is true the petition alleges that "said contracts are null and void for the reason that they are without consideration and contrary to public policy," and "as a transfer of property are without consideration and colorable only." This is a plea that the contracts are *nudum pactum*; that there is no consideration. Such a plea does not raise failure of consideration, or impossibility to give the full consideration. Such failure and part failure are matters which, under section 3629 of the Code, must be "specially pleaded." It is said in 13 C. J. p. 741:

"A plea of partial failure of consideration in an action on a sealed instrument reciting a consideration is bad. And at common law partial failure of consideration could not be set up as a defense, unless the transaction was fraudulent in its inception. Defendant was obliged to resort to a cross-action to recover his damages, unless he could show an entire failure of consideration."

While it is true the same text declares that now, either by statute or judicial determination, it is generally permitted to interpose the defense of a partial want of consideration or of failure of consideration in the action on the contract (thus preventing circuituity of action), of course, that does not say that a denial of all consideration in a written instrument which imports a consideration is a good plea to raise a partial lack of or a failure of consideration. The text referred to makes that plain by the statement that, while such defenses may now be interposed, that is so only "when the facts constituting the defense are specially pleaded or set out by way of recoupment or as a bar to so much of the demand as may be thus answered." And I think that *Mueller v. Batcheler*, 131 Iowa, 650, 109 N. W. 186, as analyzed in *Stewart v. Todd*, holds that this contract was fully supported by lawful consideration. At least, it is a decision that the mutual promise creating the survivorship will support the contract.

X. I concede freely it may not be so clear to others as it is to me that the decision here is an absolute impairment of the right of contract. But I do think that all minds might agree that it is at least a most serious question whether there has not been such impairment. It would seem that the least that could be done by the majority would be to give some recognition that such a federal question exists, to the end that, if the view now prevailing be here adhered to,

an opportunity be given to have the Supreme Court of the United States consider this case.

XI. One of the things claimed by the plaintiff as partnership property is the proceeds of insurance policies in \$58,000. I am utterly unable to see why she should be permitted to prevail as to this, no matter what is done about the general contract. This insurance was effected upon the lives of each of the four contracting parties by policies, in terms, made payable to the other three brothers, or survivor of them. The insurer is liable to no one but the beneficiaries thus specifically named. The widow of the deceased can have no possible claim against the insurer. There is no contractual relation between them. As said, I cannot conceive on what theory she is permitted to share in the proceeds of this insurance which, in any view, is the property of some one other than herself—is an obligation that can rightfully be paid only to others than herself.

XII. I have to say further the evidence in this record demonstrates positively and unequivocally that the widow knew of and acquiesced in and profited by the joint arrangement evidenced by those contracts, and for many years. In my opinion, she should be held to be bound by an estoppel, as was the widow in the Allbright Case, 103 Iowa, 98, 72 N. W. 421, where there was less foundation for the estoppel than there is here.

One may grant, for the sake of argument, that this widow should not have been placed by her late husband in the position I find her in, and that judges as men may properly entertain a desire that she should have a distributive share in this property; but the judges should bow to the law as they find it, even if it results that what is desirable and abstractedly equitable may not be accomplished.

I would reverse.

259 In the Supreme Court of Iowa, April 5, 1921

Supreme Court No. 32408

[Title omitted]

Appeal from Polk District Court

SUBMISSION OF CAUSE ON SECOND PETITION FOR REHEARING

This cause is submitted on appellant's petition for rehearing on file and oral argument of counsel for the petitioner.

SR 31-331.

I hereby certify that the foregoing is a full, true and complete copy of the submission entry of April 5, 1921, in the above entitled cause, as true, full and complete as the same remains of record and on file in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 15th day of December, A. D. 1922.

B. W. Garrett, Clerk of Supreme Court
(Seal of the Supreme Court of Iowa.)

260 & 261

In the Supreme Court of Iowa

ANNA B. FLEMING

vs.

ROBERT J. FLEMING et al., Appellants

Appeal from Polk District Court.

JUDGMENT RECORD ENTRY ON SECOND REHEARING

In this cause, the Court being fully advised in the premises, file their written supplemental opinion modifying their former opinion filed herein, and Modifying and Affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby modified and affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellants pay the costs of this appeal, taxed at \$54.95, and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court, filed on the 28th day of September, 1921, in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 15th day of December A. D. 1922,

B. W. Garrett, Clerk of Supreme Court.
(Seal of the Supreme Court of Iowa.)

22

OPINION ON SECOND REHEARING

(Supreme Court of Iowa, Sept. 28, 1921)

(No. 32408)

FLEMING

v.

FLEMING

1. Insurance *116 (1), 138 (1)—Partner has insurable interest in life of other partners; joint policy valid.—Each member of a partnership has an insurable interest in the life of every other member, and an undertaking of an insurance company to pay death loss upon any life to surviving members of firm is legitimate.

*For other cases see same topic and key-number in all key-numbered digests and indexes.

2. Dower *17—Proceeds of insurance policy held not assets of firm.—Where four partners carried insurance, undertaking of company being to pay the death loss upon any life to the other three members of the firm, expense of insurance being borne by beneficiaries, the proceeds of the policy on death was not an asset of the firm in which widow of deceased partner had an interest, in the absence of pleading and proof of facts aliunde which would equitably impress a trust upon such proceeds in the hands of the surviving partners.

3. Appeal and error *835 (2)—Point that opinion overrules prior decision and hence denies due process not noticed on second rehearing.—The point that opinion of court overruled a prior decision, and hence was a violation of the Constitution of the United States in that it deprives a person of property without due process of law, made for the first time on second rehearing will not be considered.

Appeal from District Court, Polk County

C. A. Dudley, Judge

On second rehearing.—Former opinions and decree in court below modified. For former opinions, see 174 N. W. 946; 180 N. W. 206.

A. B. Cummins, Parrish, Parker & Miller and W. E. Miller, all of Des Moines, for appellants.

Parsons & Mills, of Des Moines, for appellee.

EVANS, C. J.: It is to be conceded that our former opinions (174 N. W. 946, 180 N. W. 206) are incomplete in their discussion, in that the item of "life insurance" is not considered therein. It is a matter of some doubt whether the pleadings make any issue as to such item. The only reference thereto in the petition of plaintiff is contained in paragraphs 6 and 11. Paragraph 6 was as follows:

"That plaintiff's deceased husband carried life insurance in the amount of \$58,000."

Paragraph 11 averred that the three defendants had collected such life insurance, and appropriated the same to their own use. It was not alleged that the plaintiff was the beneficiary of the policy; nor was any other fact pleaded as a basis for the claim that the insurance proceeds belonged to her either in whole or in part. The trial court filed a lengthy written opinion in the case, comprising apparently a complete discussion of all points presented for his consideration. No reference is made therein to the item of insurance. The opening argument of plaintiff as appellee purports to be a full discussion of the case, but no reference is contained therein to the insurance. However, the decree entered by the trial court did in terms declare the insurance proceeds to be a part of the partnership property. The implication from such finding would naturally be that the plaintiff was entitled to recover the one-eighth part thereof. The only

*For other cases see same topic and key-number in all key-numbered digests and indexes.

disclosure of the detailed facts pertaining to such insurance is to be found in the answer of the defendants, appellants here, and in the evidence in their behalf. It is to be said also that the appellants made proper point in their opening argument here, calling in question that feature of the decree entered below. It is true that the basis of their claims of right to such proceeds which was put forth by them with greatest emphasis was the contract which we have already considered in our former opinions, and which we hold to be ineffective as a bar to the widow. But they did base their claims of right also upon other grounds which we here consider. If the item had not been specified in terms in the decree, we should be inclined to hold that it was not within any material issue tendered by the petition. Inasmuch as the decree did specifically purport to adjudicate it, the appellants are entitled to demand our consideration of it in a specific sense.

263 & 264 [1, 2] The undisputed facts as they appear from the pleadings and the evidence of the defendants are that the "life insurance" in question was payable to the three brothers, appellants herein. It appears that similar insurance was carried upon the life of each member of the firm in favor of the other three members thereof. The undertaking of the insuring company was to pay the death loss upon any life to the other three members of the firm. Such form of insurance was legitimate. Each member of the firm had an insurable interest in the life of every other. The expense of the insurance was borne by the beneficiaries. It appears also that the insuring company held all these policies as security for loans negotiated to the firm. The method of collection of these policies upon the life of decedent was that the insuring company applied the full proceeds as a credit upon the indebtedness owing to it by the firm and the members thereof. It is manifest therefore that upon the face of the insurance contract the three defendants had the legal right to the proceeds of the "death loss." They and they only could have maintained an action therefor against the insurance company. If there be facts aliunde which would equitably impress a trust nevertheless upon these proceeds in the hands of these defendants, it was incumbent upon the plaintiff to plead and to prove such facts. Nothing of that kind was attempted by her. The manifest objective of her petition was to obtain an adjudication that the contract under attack was ineffective to bar her right of distributive share. The emphasis of the litigation was concentrated upon that proposition. We have sustained the contention of the plaintiff in that regard. But, even so, such contract has no effect whatever upon the question of the defendants' right to the insurance proceeds. They do not take such proceeds under and by virtue of the contract under attack, neither are they forbidden to take the same thereby. They take such proceeds under and by virtue of the insurance contract and of that alone. Their right thereto is neither greater nor less by reason of the contract of alleged joint tenancy.

We reach the conclusion therefore that the item of "life insurance" proceeds should be eliminated from plaintiff's recovery, and that

the decree entered Lelow should be modified to that extent. In all other respects, the petition for rehearing is overruled.

[3] II. The appellants urge upon us very earnestly that the effect of our holding here is to overrule prior decisions, and therefore to deprive appellants of their property without due process of law in alleged violation of the Constitution of the United States. The premise upon which such plea of unconstitutionality is based is negatived by the opinion complained of. It does not purport to overrule prior decisions. Appellants' contention to such effect is argumentative only, and is not sustained by us. Moreover, if the premise were conceded, and if it were deemed correct to say that the overruling of a prior decision by an appellate court of a State is a violation of the Constitution of the United States, such point would have been just as available to the appellants in their original argument as in their petition for rehearing. No such point was therein made.

We are asked to recognize the point now made as presenting a Federal question. If we could properly do so as a matter of sincere deference to the higher court or as a matter of courtesy to the distinguished counsel, we should not be reluctant to make such declaration as would enable a review of our decision by the higher court. But judicial candor compels us to say that we see no Federal question involved. The decree below will be modified as above indicated, and otherwise affirmed.

265 In the Supreme Court of Iowa, April 4, 1922

Supreme Court No. 32408

[Title omitted]

Appeal from Polk District Court

SUBMISSION OF CAUSE ON THIRD PETITION FOR REHEARING

This cause is submitted on appellant's petition for rehearing and resistance on file.

SR 31-435.

Ordered by the Court and entered of record on the 4th day of April, A. D. 1922.

A true copy.

Attested:

B. W. Garrett, Clerk of Supreme Court.
[Seal of the Supreme Court of Iowa.]

266 In the Supreme Court of Iowa, September 23, 1922

No. 32408

[Title omitted]

Appeal from Polk District Court

ORDER OVERRULING THIRD PETITION FOR REHEARING

Appellant's petition for rehearing having been fully considered is overruled. Ordered that procedendo and execution issue.

Ordered by the Court and entered of record on the 23rd day of April, A. D. 1922.

A True Copy.

Attested:

B. W. Garrett, Clerk of Supreme Court.
[Seal of the Supreme Court of Iowa.]

267

[File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

Appeal from Polk District Court

PETITION FOR WRIT OF ERROR

[Filed Dec. 16, 1922]

To the Honorable Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa:

Now come the said Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, impleaded as a partnership, and John A. Fleming, Administrator of the Estate of Charles Fleming, deceased, the said defendants and appellants, and on this, the 14th day of December, A. D. 1922 apply for a Writ of Error from the said Supreme Court of Iowa to the Supreme Court of the United States, and as and for their Petition for Writ of Error state:

That on the fifth day of July, A. D. 1916, the said Anna B. Fleming, plaintiff, appellee, filed in the office of the Clerk of the District Court of Iowa, in and for Polk County, a Petition in Equity, duly verified. That on the eleventh day of September, A. D. 1916, the defendants filed in the said Court and cause a duly verified Answer to said petition. And between said Petition and the said Answer the following issues were developed and the following matters respectively alleged, admitted, qualifiedly admitted, and denied, to-wit:

268 It is admitted that on the second day of January, 1881, plaintiff was married to Charles Fleming, now deceased; that he died in Polk County, Iowa, on the 15th day of January, 1916, leaving no last will and testament and no issue, and leaving surviving him the plaintiff, who is his widow, and three brothers, to-wit: Stanhope Fleming, Robert J. Fleming and John A. Fleming, and admitted that the defendants herein and the plaintiff are residents of Des Moines, Polk County, Iowa.

Defendants admit that plaintiff joined in petitioning for the appointment of John A. Fleming as administrator of the estate of Charles Fleming, deceased, and deny that this was done at the solicitation of the defendants.

They admit that they claim to own jointly, and aver that they do own jointly, as surviving joint tenants, all of the property in which their deceased brother, Charles Fleming, had an interest during his lifetime, his household effects alone excepted, and that the said joint estate in which said Charles Fleming was interested in his lifetime did not and does not include the household effects of which the said deceased brother of defendants was possessed. That as to whether plaintiff learned for the first time at the time she joined in a petition that said John A. Fleming be made administrator that said brothers claimed to own all the property of her deceased husband save and except the exempt household goods, and as to when plaintiff learned for the first time of the nature, character and extent of the interest of these defendants in the alleged property of Charles Fleming, deceased, defendants say they have neither knowledge nor information sufficient to form a belief.

269 Defendants deny that plaintiff's deceased husband and these defendants had for all of their business lives been associated together in business as a partnership in all their business transactions; deny that they owned all of their property in equal proportions; and deny that plaintiff's deceased husband died seized of an undivided one-fourth interest of all of the partnership property, subject only to a proportionate share of the partnership debts.

The defendants admit that they jointly, with their deceased brother, formed a corporation in the year 1901, which corporation was known as "Fleming Brothers, Incorporated". They deny that the stock in said corporation was equally divided among the four brothers, 2,500 shares to each; deny that there was partnership property and that a fourth thereof was owned by plaintiff's deceased husband, and deny that among said alleged partnership property was a certificate of 2,500 shares of stock in the Fleming Brothers, Incorporated, in the name of Charles Fleming. They deny that said stock was in any wise divided except nominally, and say that said nominal division was as follows:

About the year 1913, pursuant to the contracts set out in the Petition of plaintiff, certificates aggregating 2,500 shares were issued by said corporation in the name of each of the four brothers, joint owners and tenants, as aforesaid; that upon the issuance of said certificates each of the four brothers, Charles Fleming included, forthwith endorsed in blank the certificate or certificates issued in the

name of each, and each of the four brothers, as joint tenants, thereupon forthwith deposited all of the certificates, pursuant to said contract, in a common receptacle in their office, to which each and all of the four brothers, as such joint tenants, had access at all times; that

in truth and in fact the entire stock of Fleming Brothers,
270 Incorporated, was at all times and now is owned jointly by

Fleming Brothers, as joint tenants, and by the survivors or survivor of them in the case of the death of any of the joint tenants. They expressly deny there was ever any division of the stock of Fleming Brothers, Incorporated, among the four brothers, but aver that Fleming Brothers, Incorporated, is now and at all times has been owned as a joint tenancy by the joint tenants aforesaid, and the survivor of them.

They deny that there stood also in plaintiff's deceased husband's name at the time of his death certain real estate, which it is alleged is now claimed to be owned by the three surviving brothers, the defendants herein. They aver that any and all real estate which at the time of his death stood in the name of Charles Fleming was at all times and is the property of Fleming Brothers, with the incident of survivorship as between them; they aver that all such property was acquired with joint funds, and held for the joint benefit of said joint tenants, and the survivors or survivor of them. And aver that by reason of the fact that the only interest Charles Fleming, deceased, ever had in said real estate was that of a joint tenant, he, Charles Fleming, did not die seized of any estate in real estate, and plaintiff is not and never was seized of, possessed of, or entitled to any dower interest or distributive share in any real estate by reason of her relationship to Charles Fleming.

By general denial defendants deny that the Fleming building in the city of Des Moines, and other real estate, is so a part of the assets of Fleming Brothers, incorporated, as that an interest of plaintiff's deceased husband in said property exists, or ever existed, or was evidenced by his certificate of stock in Fleming Brothers, Incorporated, in the amount of 2,500 shares.

271 By general denial defendants deny the allegation that the three brothers named as defendants claim that said stock is theirs; deny they have turned in and had cancelled each certificate of 2,500 shares, and that they have turned in and marked cancelled the certificate of 2,500 shares which plaintiff alleges was the property of her deceased husband, and deny that they have reissued to themselves the 10,000 shares in certificates of one-third of 10,000 shares to each of them.

Admit that defendant John A. Fleming, administrator of the estate of plaintiff's deceased husband, filed in the probate division of this court a statement claiming that he and his brothers, Stanhope and Robert, were the owners of all of the property of Charles Fleming, deceased, save and except the said household goods, which admission is coupled with the statement that it is made as qualified or explained by the other allegations of the answer. They admit that the petition contains substantially correct copies of the three certain contracts therein set out, to-wit: One made on December 14, A. D.

1896, the second on January 23, A. D. 1897, and the third and last on the 17th day of January, A. D. 1911. They aver that under and by virtue of the said contracts they, as surviving brothers and joint tenants of Charles Fleming deceased, are the absolute owners of all of the property of every manner and nature of which Charles Fleming was possessed, or to which he had title in his life time, save and except the said exempt personal property; and they aver that the said contracts are valid and binding in all respects upon the plaintiff, and are binding upon and inure to the benefit of these defendants as the surviving joint tenants of their late brother, Charles Fleming, deceased.

272 They deny that said contracts are null and void on the alleged ground that they are without consideration, and contrary to public policy; deny they are further null and void on the alleged ground that they operate as a fraud upon this plaintiff and her rights as the widow of the deceased; deny that plaintiff is entitled to the distributive share of the property of her deceased husband, in accordance with the provisions of the statutes of Iowa; deny that the husband of plaintiff died seized of an undivided one-fourth interest in all of the property of Fleming Brothers as a partnership; deny there was partnership property which included all of the capital stock and property of Fleming Brothers, Incorporated; deny that said contracts are testamentary in character, and that they purport to do or accomplish in themselves what cannot be accomplished by will under the statutes of the State of Iowa; deny that said contracts are of no binding force or effect on plaintiff; deny the allegation that as a transfer of property said contracts are without consideration and colorable only, and not in good faith; deny they were for the purpose of defeating plaintiff's rights as a widow; deny they were concealed from her and not made known to her until after the death of her husband; deny that during all the years of plaintiff's married life she has never been advised of any arrangement such as are outlined in said contracts, and deny that during all her married life she assisted in accumulating the property of which she claims her husband died seized.

They aver that during all of the period of his business life and during the period of the marriage relation between him and plaintiff, Charles Fleming, deceased, did business jointly as a joint owner, joint worker and joint tenant with his said three brothers, and not otherwise; that during all of said period neither the said

273 Charles Fleming nor any other member of said joint tenancy conducted any business or acquired any property individually except some household effects, wearing apparel, pin money and the like; that during the entire business life and career of Charles Fleming, and the entire period of his marriage relation to plaintiff, all of the affairs of himself and these three defendants has been conducted jointly, and his personal and household expenses, including the personal expenses and pin money of the plaintiff, were paid out on checks issued and signed by Fleming Brothers; that during all of the said period each and every member of the Fleming family, in-

cluding the plaintiff, has received all personal funds or maintenance and all pin money from Fleming Brothers.

These defendants expressly deny that their brother, Charles Fleming, died seized or possessed of any estate in any property whatsoever except household effects; and expressly deny that their said brother Charles, either during his life time or at his death, owned or was possessed of or entitled to any estate of inheritance or any estate in which the plaintiff was, is, or could be entitled to a dower or distributive share or interest of any sort.

The said three writings set out in the Petition as contracts are respectively as follows:

The contract set out in the Petition, to-wit: The one of date December 14, 1896, is made, signed and executed by each of the three defendants, and by Charles Fleming, now deceased. It declares it is made in order to provide for the future uninterrupted prosecution of the business of life insurance in which the signers are then or may be hereafter engaged and mutually associated; declares it is made to fix and determine the interest of each therein

and that, therefore, the signers mutually agree and bind themselves, their heirs, executors, administrators or survivors, and all other persons, that each of the signers shall have only such share of and interest in the proceeds, earnings and income in the business of life insurance in which they are or shall be jointly engaged, as shall be actually received by each or paid upon the order of each with the consent of the others from the income of said business.

It is agreed that such amount so paid shall fully represent the share and interest of each of the parties to the contract, at any time while the signers shall be associated together in said business, or thereafter (repeated in second writing).

It is further agreed that upon the death or withdrawal of any party to this contract, all his interest in said business shall thereupon cease and determine, and that at no time shall any accounting be made or required to be made by any party to the contract, or his representatives, executors, heirs or survivors (repeated in second writing), or any other person claiming under him, or to any person, officer or representatives, upon any basis of labor performed or money received on account of said business by any of the parties to the contract or otherwise.

It is distinctly understood and agreed between the signers that they nor any of them have or can have any property rights or money interest in said business other than that herein specified and defined, and any sum of money paid to or for any parties to the contract shall be in full of the interest of said party in said business.

The Second Contract—Date January 23, 1897.

It declares that in view of their past association and the manner of the conduct of their business, without the usual and ordinary incidents of a partnership, and to more effectually define and determine their individual interest in said business in the future, as

275 between themselves, and in relation to all other persons, and in order to provide for the future uninterrupted prosecution of said business in which the signers are now engaged or may be hereafter associated, they mutually agree and bind themselves, their heirs, executors, administrators, survivors and all other persons, as follows:

That in consideration of the service of each of the signers rendered, or hereafter to be rendered in the business of life insurance, or income to be derived therefrom, and of the mutual stipulations contained in this writing, each signer

Has and thereafter shall have only such share of and interest in the profits, earnings, renewals due or to become due under any and all contracts of insurance or commissions thereon, to whomsoever nominally payable, in the business of life insurance in which the signers are now or any of them shall hereafter be jointly engaged, as shall be actually received by each, or shall be paid upon the order of each, with the consent of the others from general funds or income of the said business.

It is further stipulated and agreed that any and all contract rights and all interest in renewals or policies of insurance in the Mutual Life Insurance Company of New York due or to become due since January, 1893, all commissions earned or hereafter to be earned, and all bonuses allowed, payable, or to become payable in any manner, whether payable or standing in the name of Robert J. Fleming, or any other of the parties to this agreement, are hereby assigned and transferred to — for the mutual benefit of the parties hereto, to be used, applied and disposed of in the manner only as herein agreed and provided for.

It being the intention of all the parties to this agreement, and they thereby declare that they nor any of them have or can have any property rights or money interest in said business other than that herein specified and defined, so long as any of them shall be associated together in the business of life insurance.

276 Third Contract, Date January 17, A. D. 1911.

It recites that the signers are engaged in the life insurance business in the states of Iowa, Nebraska and Wyoming, under a contract with the Massachusetts Mutual Life Insurance Company.

That, whereas, each of the signers is the owner of one-fourth of the stock of a corporation organized under the laws of the State of Iowa, known as Fleming Brothers, Incorporated, and are also the owner of certain real estate and other property in which each of them is interested, and, whereas, they expect to acquire additional property hereafter, and whereas, said property now held and owned by the signers has been acquired by them with the understanding that it shall be disposed of as hereinafter set out.

Therefore, in consideration of the premises and \$1.00 in hand paid by each of the signers to each of the others, it is agreed—

That the partnership between the undersigned is with the express

and distinct understanding and agreement that all of the property heretofore acquired by the signers has been acquired as the result of the said partnership, and that said property now belongs to the said partnership, including all proceeds of said insurance business, with the renewals to which the parties hereto may be entitled thereon.

Upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners which embraces said stock in Fleming Brothers, Incorporated, shall be and become the property of the surviving brothers of said partnership.

And that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein, and the sole and entire interest of his estate therein.

It is recited that the premiums upon all other life policies have been paid by the said partnership, and the same is entitled to the proceeds of all such insurance.

277 This contract covers not only the property now owned but also property hereafter acquired; and all hereafter acquired property, including the proceeds of life insurance, whether standing in the name of said individuals or either of them, or in the firm name, is understood to be firm property, unless there be an express agreement to the contrary—(the only reservation is a certain policy on the life of Robert J. Fleming, payable to his wife, Emma D. Fleming).

The prayer of the plaintiff is that decree be entered construing said contracts to have no binding force or effect on plaintiff; decreeing that as to her Charles Fleming died intestate; decreeing that all of the property now held by the defendants, including all the assets of Fleming Brothers, Incorporated, represented by the corporate stock which is a part of the property of said defendant partnership, be held, in so far as the interest of this plaintiff is concerned, in trust for her; decreeing that the amount of her interest under the statutes of the State of Iowa, as the surviving widow of Charles Fleming, deceased, be fixed and determined by the Court and impressed in that amount upon said property in the hands of the defendants. It is further prayed that she be decreed such other, further and different equitable relief as to the court may seem just in the premises, and for her costs.

The defendants pray that plaintiff's Petition be dismissed and that they have judgment against her for the costs of this proceeding.

The cause was submitted to the Honorable Charles A. Dudley, Judge of said District Court. On or about April 14, 1917, he handed down a written opinion which announces substantially the following conclusions:

1. That the relationship existing between the four brothers at the time of the death of Charles was a partnership. And as there 278 was no agreement as to what the interest of each partner should be in the partnership property, the presumption is their interests were equal—wherefore, Charles, at the time of his death, was the owner of one-fourth of the partnership property.

2. That the agreement of January 17, 1911, was in effect a will under the laws of Iowa and, therefore, did not operate to dispose of the interest which Charles owned in the firm at the time of his death—and that in consequence of the foregoing findings the plaintiff, as surviving widow of Charles Fleming, is entitled to an accounting to the extent of one-half of an undivided one-fourth interest in the partnership assets.

The decree incorporated these findings, and added that it was ordered, adjudged and decreed that the said three defendants proceed with reasonable dispatch to sell and dispose of sufficient of the aforesaid co-partnership property to pay all the indebtedness thereof, and thereupon transfer and deliver to the administrator of the estate of Charles Fleming, deceased, one-fourth of the residue of said property to be distributed by him according to law; and the costs were taxed to said three defendants.

Thereupon, the said defendants duly perfected an appeal from said decree and said erroneous rulings of the said District Court to the Supreme Court of Iowa. In that Court they presented the following propositions and points in accordance with the rules of said Supreme Court, and to the end that a reversal of the action in the trial court might be had and done by the said Supreme Court.

The said propositions and points are set forth on the first sheets of the stipulated record, of which this paper is a part, to-wit on the eighty third to the eighty seventh sheet, both inclusive, on sheets one hundred to one hundred and six, both inclusive, on sheets one hundred and twelve to one hundred and fifteen, both inclusive, and on sheets one hundred and sixteen and one hundred and seventeen.

279 The Supreme Court of Iowa, notwithstanding, gave its final judgment overruling the third petition for rehearing filed by these defendants and appellants. It took this action on the 23rd day of December, A. D. 1922, and on that day affirmed in all respects the action of the said District Court—all of which matters appear in the record and proceedings of the above entitled suit and cause in said Supreme Court of Iowa.

The petitioners aver and claim that the said action of the Supreme Court of Iowa in affirming the said action and decree of said District Court was manifest error.

Wherefore, your petitioners pray for the allowance of a Writ of Error to take said proceedings to the Supreme Court of the United States for the determination of the last named Court; and they pray for such other process as may cause the action of the said Supreme Court of Iowa to be corrected by the Supreme Court of the United States.

Albert B. Cummins, Clinton L. Nourse, and
William E. Miller, Attorneys for Defendants and Appellants.

Upon consideration of the above Petition it is on this 15th day of December A. D. 1922, and hereby ordered that a Writ of Error be and hereby is allowed as prayed in the foregoing Petition, to have

reviewed by the Supreme Court of the United States the judgment hereinbefore entered in the above entitled cause, upon the petitioner giving bond according to law in the sum of one thousand Dollars, which bond shall operate as a supersedeas bond.

Truman S. Stevens, Chief Justice of the Supreme Court of Iowa.

280

[File endorsement omitted]

WRIT OF ERROR

[Filed Dec. 16, 1922]

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said Supreme Court of Iowa, being the highest court of law or equity of the said State in which a decision could be had in said suit between Anna B. Fleming, Plaintiff, Appellee and Defendant in Error, herein, and Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, Defendants, Appellants and Plaintiffs in Error herein, wherein was drawn a question of right or privilege set up and claimed under the Constitution of the United States and the decision of said Supreme Court of Iowa was against the rights and privileges as and so set up and claimed, and wherein was drawn in question whether the decision of the district court of Iowa and the said decision of the Supreme Court of Iowa, affirming said decision and decree of the District Court, was repugnant and violative of the Constitution of the United States, and the decision was that there was no repugnancy or violation of the constitution—a manifest error hath happened to the great damage of the said Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, a partnership, and John a Fleming, Administrator of the estate of Charles Fleming, deceased, as by their complaint appears:

We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you if judgment be therein given that then under your seal, distinctly and openly, you send 281 the records and proceedings aforesaid with all information concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty (30) days from this date (unless that period be duly enlarged after signing the citation therein), in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to

correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this fifteenth day of December, A. D. Nineteen Hundred and Twenty-two.

N. F. Reed, Clerk District Court of the United States for the Southern District of Iowa. [Seal of the U. S. District Court. Southern District of Iowa.] Attest: Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa.

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[File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

Appeal from Polk District Court

PRAYER FOR REVERSAL

[Filed Dec. 16, 1922]

To the Honorable the Supreme Court of the United States:

And now come the said Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, impleaded as a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, the Plaintiffs in Error herein, and pray for a reversal of the judgment of the Supreme Court of Iowa, in an action brought by Anna B. Fleming, Plaintiff and Appellee, against Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, and in which action a judgment was rendered by the Supreme Court of Iowa on the 23rd day of September, A. D. 1922, and entered in the office of the Clerk of the Supreme Court of Iowa on said date, which judgment so entered affirmed the action of the District Court of Iowa, in and for Polk County, earlier entered, and which said judgment and decree of said District Court and said affirming judgment by the Supreme Court of Iowa decreed, adjudged and held that these aforesaid plaintiffs in error, either or all of them, could not enforce the certain three writings executed and entered into by the said Robert J. Fleming.

283 John A. Fleming, Stanhope Fleming and Charles Fleming; decreeing and adjudging further that notwithstanding said three writings (which constituted an agreement that the survivor of the said four Flemings should have full title to any and all property acquired by the said four Flemings, and in existence at a time when some one of these four were the sole survivors), had no validity

against the claim of dower asserted by Anna B. Fleming, plaintiff, on account of her being the wife of the said Charles Fleming, while said Fleming was living. The said three writings were executed respectively December 14, A. D. 1896, January 23, A. D. 1897, and January 17, A. D. 1911, and are the three writings set forth in *hic verba* in the Petition for Writ of Error filed in this cause.

Albert B. Cummins, Clinton L. Nourse, and
William E. Miller, Attorneys for Defendants, Appellants and Petitioners.

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[File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

Appeal from Polk District Court

ASSIGNMENT OF ERRORS

[Filed Dec. 16, 1922]

Come now the above named Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, impleaded as a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, Appellants and Plaintiffs in Error, and in connection with their writ of error respectively submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Iowa, in the above entitled cause and matter, there is manifest error as hereinafter set out: And said Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, Defendants, Appellants and Plaintiffs in Error, make and file this their Assignment of Errors:

1. The court erred in attempting to construe the three writing set forth in petition for writ of error, because each of them are so plain as to need no construction.

285 2. After having properly declared that the three writings together constituted the contract, and should be construed together as one contract, and that the meaning of the one contract was to be determined from construing the three together—it was error for the Supreme Court of Iowa to rule further that the third writing was of more controlling force on the argument that same was the last expression of the parties as to the subject matter of the three contracts.

3. Erred in declining and refusing to hold that the existence or non-existence of a partnership was irrelevant and immaterial, and erred in holding that a partnership and its members could not make a valid contract with the incidents of survivorship.

4. The Court erred in holding that the three writings, singly or together, were a contract of partnership, or created a partnership, or

the relation of partners, or any relationship from which the ordinary incidents or consequences of partnership resulted; and it erred in treating the joint property of the four Flemings as mere partnership property.

5. Erred in holding that the contracts were in terms partnership contracts, and were not contracts creating in lawful effect a joint tenancy with provision for survivorship, and excluding inheritance and dower rights.

6. The Court erred in holding there was here a partnership, because, among other things, the contract stipulates that each might draw at will without accounting to any of the others, because it is undisputed that then there was no stipulation that either should bear losses; and because no account was made, kept or contemplated of the relative or actual earnings or contribution of any one of the brothers to the joint estate or income.

286 7. Erred in holding it was proved that the parties understood their relationship to be that of partners and not of joint tenants, and in so holding, despite the undisputed testimony to the contrary, that all parties understood the agreement was not one of partnership, that said agreements, singly or together, and the conduct of the parties, evidenced a partnership of the ordinary sort.

8. Erred in holding that even if the members of a partnership created a joint tenancy and entered into contract with attributes of survivorship that yet each partner is vested with an estate that survives his death.

9. Erred in holding that there ever was in existence a partnership relation which worked that Charles Fleming was or remained the possessor, at his death, of an inheritable estate.

10. The court erred in failing and refusing to hold that the plaintiff widow knew of and acquiesced in and profited by the joint arrangement evidenced by the contracts at bar, and so acquiesced in and profited by for many years, and therefore, erred in failing and refusing to hold that plaintiff should be held to be bound as by an estoppel.

11. The Court erred in holding that the venture covered by these contracts was a commercial enterprise.

12. The Court erred in holding that plaintiff had dower rights on the argument that the venture covered by these contracts was a commercial enterprise.

13. The Court erred in holding that it was material, if true, that the venture covered by these writings was a commercial enterprise.

287 14. After properly ruling that mere nomenclature was not controlling it was error to rule also that the nonuse of the word "partnership" in the first two writings was of no consequence while its use in the third writing was of great if not controlling importance.

15. The Court erred in holding it to be material that the contracts at bar do not purport "in terms to create a common law joint tenancy."

16. The Court erred in holding that contracts such as these at

bar are not effective unless they in terms purport to create a common law joint tenancy.

17. The Court erred in holding that there can be no joint tenancy in property other than land.

18. The Court not only erred in holding that there could be no joint tenancy in property other than land, but in so doing overruled and departed from its holding in *Baker v. Syfritt*, 147 Iowa, 49, which case was decided prior to the making of the last of the three contracts in controversy, and in which a contract of survivorship was enforced both as to lands and personal property.

19. The Court erred in holding it to be material that "the alleged joint tenancy was not created by the act of any third party, but was created, if at all, solely by the contract of the alleged tenants."

20. The Court erred in holding that the contracts at bar did not effectually create a joint tenancy with incident of survivorship on the reasoning that the alleged joint tenancy was not created, by any act of any third party, but was created, if at all, solely by the contract of the alleged tenants—it being error to hold that there could

288 not be joint tenancy and a valid contract of survivorship merely because the contract creating these was the contract of the alleged tenants.

21. The Court erred in holding erroneously that the theory of joint tenancy in a common law sense was not available to these appellants.

22. Erred in refusing and declining to hold that here was a contract creating what is essentially a joint tenancy by mere operation of law, especially as it has an expressed agreement that the survivor should take what was left.

23. The Court erred in holding that it was material that joint tenancy statutes were not now in as much favor as they were in earlier times.

24. The Court erred in holding it to be material that there was a change made by creating a corporation, and in holding that this affected any property rights theretofore existing, and so erred because plaintiff has declared in the record that the said corporation and the said shares were and remained the property of the alleged partnership.

25. After holding that the creation of the corporation and the issuing and dealing with the shares as was done was nothing but a change of form, the court erred in dealing with said creation and said issuing and dealing as though it was more than a change of form and was operative to give to each of the four an inheritable estate to which dower right could attach.

26. Erred after holding mere form would not control the court, that the mere formality of transferring stock in blank, which stock was covered by an express contract of survivorship, was in some way material, so that plaintiff's right of dower could attach. And this, though under the contract said stock, if it represented or 289 was anything, merely took the place of the property belonging to the joint venture.

27. Erred in holding that though in form Charles Fleming trans-

ferred all his property to the corporation, he was the joint creator of that corporation and owned one-fourth thereof.

28. Erred in holding it to be material, if true, that Charles transferred all his property to the corporation in form alone and in holding it to be material, if true, that he was the joint creator of the corporation, and owned one-fourth thereof.

29. Erred in holding it to be material, if true, that though each of the parties transferred his stock, in severalty to all of them jointly, and thereby changed the form of his property right, he still owned the substance thereof.

30. The Court erred in holding it to be material that if the four brothers had at any time attempted a partition as between themselves, each much have received his one-fourth of the corporate property or stock.

31. The Court erred in holding it to be material that the benefits of said property still accrued to the same party, and that no fifth party ever acquired an interest in said property or an incumbrance thereon.

32. The Court erred in holding that Charles Fleming did not transfer his personal property, on the asserted ground that there was no transferee.

33. The court erred in holding it to be material that there was no transferee and no taker of delivery, and in holding it to be material, if true, that the four brothers all put their shares into a common receptacle, and locked them in a safe to await eventualities.

290 34. The court erred in holding it to be material that it cannot be told to whom Charles Fleming endorsed nor to whom he made delivery of the stock in said corporation.

35. The Court erred in holding that the deposit of said stock by each of the four, and the assignment of each in blank did not amount at the time to a constructive delivery to the joint tenancy.

36. The Court erred in holding it to be material, if true, that the rights of these appellants are affected by a failure of each to deliver and vest title in each of the others.

37. The Court erred in holding it to be material, if true, that there was no disseizement from one in favor of either of the others.

38. In holding that a disseizement or a delivery or a vesting from each to the other was essential, the court departed from its holding in *Baker vs. Syfritt*, 147 Iowa, 49.

39. The Court erred after holding that there was in truth no delivery of the corporation stock, that yet the creation and locking up of said stock in a box in some way operated to create a property in Charles Fleming to which dower could attach.

40. The Court erred in holding it to be material that there was no delivery of the shares, for if that be true what was done amounted to nothing, and the deed to the property remained as it was before the attempted transfer of said corporation stock.

41. The Court erred in its attitude with reference to said stock, because its argument on that point would make every survivorship

contract void. For in that in no survivorship contract is
 291 every item of property at all times under the control and in
 the possession of one partner or joint venturer as much as in
 that of the other. Nor a moment when one party did not have
 equally full access to everything belonging to the joint venture, and
 the benefits always did still accrue to all contracting parties.

42. The Court erred in holding it to be material that the property
 in question at all times remained in the dominion of the said parties,
 to-wit: the said four brothers and the said three brothers after the
 decease of Charles.

43. The Court erred in holding it to be material that, in a sense,
 what was done was a transfer from one signer to the other, for such
 assignment merely accepted the fund upon which the survivorship
 contract was to operate.

44. Erred in holding that no estate in the tangible property which
 had accumulated as a result of the business enterprise was by express
 provision vested in any person, persons, or entity.

45. Erred in holding it to be material, if true, that no estate in
 the tangible property that accumulated as a result of the business
 enterprise was by express provisions vested in any person, persons
 or entity.

46. Erred in holding it could not have been the thought of the
 Fleming Brothers that the title to the property acquired as it came
 in existence should none of it vest in anyone, except that portion of
 the property which was taken and appropriated by each to his
 immediate needs.

292 47. Erred in holding it to be material, if true, that the
 Fleming Brothers could not have thought that the only prop-
 erty acquired as it came into existence which should vest in anyone
 was that portion taken and appropriated by each to his immediate
 needs.

48. Erred in holding that for the purpose of this suit it must be
 assumed that title to property that can be the subject of ownership
 vests in someone, whether it be an individual, individuals or a legal
 entity.

49. Erred in holding it to be material, if true, that for the purpose
 of this suit title to property that can be the subject of ownership
 must be assumed to vest in someone whether it be an individual, in-
 dividuals or a legal entity.

50. It erred in ignoring the law of contingent remainders under
 which there may be a vesting for some purposes in a class, though, at
 the time when such remainder is created, no one can tell who, if
 anyone, would be in the class when the time for distribution came.

51. Erred in not holding that the vesting under the contracts at
 bar was not within the rule that governs the vesting of title in gifts
 inter vivos and gifts causa mortis.

52. The Court erred in holding that all there was here was an
 inchoate vesting, with provision that someone ultimately have full
 title.

53. The Court erred in holding that because in the lifetime of all
 but the last survivor there was nothing but an inchoate title in

either, that, therefore, if one died before the others, he died seized of anything to which a dower right could attach.

293 54. The Court departed from its holding in Albright vs. Hannah, 103 Iowa, 102, wherein it was ruled that for the purpose of sustaining survivorship contracts that may be deemed a present transfer of the fee which for some purposes is not deemed to be such transfer.

55. Erred in holding that under any statute of the State of Iowa any of the property held or accumulated ever so vested in any one of the signers as that on his decease, despite his contract, Charles died so seized of anything as that dower could attach.

56. The Court erred in holding that there could be a dower right interest in favor of a surviving spouse where the other spouse was during the marriage merely a joint tenant in both real and personal property.

57. Erred in holding that at the time of his decease Charles had such an interest in said property that plaintiff is entitled to a distributive share therein.

58. The Court erred in holding that Charles Fleming was at the time of his decease seized of any property, or of any property to which dower could attach; erred in holding that at said time anything existed up on which any dower right of plaintiff could attach.

59. Since the writings declare that they are made to fix and determine the interest of each and of all the signers; that each signer shall have only such share as shall be actually received by him upon order of each with the consent of the others, and that such sums so paid or received shall fully represent the share and interest of each signer as long as they remain associated together, or thereafter; and since they provide that what each has drawn to the time of his death shall

294 constitute his sole interest and the sole interest of his estate and that neither party has or can have any property rights or money interest in said business, except so defined in the writings, and that on the death or withdrawal of any signer all his interest in the business or its assets shall thereupon cease and determine and the property owned by the entity denominated partnership shall be and become the property of the survivors—and the Court erred in holding that either of the signers had any interest in the business or assets thereof beyond the amount that up to the time of his death he had drawn from the business or from its income or profits—and erred in holding, contrary to the said express provisions, and despite that the holding is entirely unsupported by the evidence, that said provisions were intended merely to cover the immediate needs of each signer, that their evident purpose was to forestall extravagance in order to conserve the interest and profits against extravagance and thereby to promote the continuance of the business without corruption.

60. Since the writings declare they are made to fix and determine the interest of each and of all the signers, that each signer shall have only such share as shall be actually received by him, that the sum paid or received shall fully represent the share and interest of each signer at all times while the signers remain associated or there-

after; since they provide that what each has drawn to the time of his death constitutes his sole interest and the sole interest of his estate, that no accounting shall be made by or required of either party, and that neither has or can have any property rights or money interest in said business, except as above defined, and
295 that on the death or withdrawal of any signer, all of his in-

terest in said business or its assets shall thereupon cease and determine and the property owned by the entity denominated partnership shall be and become the property of the surviving signers,—the court erred in holding that if either signer died before any of the others said property would not become the property of the survivor or survivors, but remain that of the predeceasing signer so that dower right on part of his spouse would attach; and erred in holding that either signer ever had greater interest than what he had drawn up to his death, for as under the contract provisions as the last survivor took all, the one who died first necessarily could not have a greater interest than what he had drawn in his lifetime.

61. Erred in first holding that while the obligations of each signer were of necessity suspended as to him while he lived, that yet Charles Fleming had an estate of which he died seized; for because of his dying as early as he did, the suspended obligation ceased at said death to be an obligation to him.

62. After having held that the only thing to be determined was the proper construction of said three writings, the court erred in construing said writings to be no bar to an assertion of dower rights on part of plaintiff.

63. After having correctly held that the sole issue was whether Charles Fleming died seized of any interest in the property held by these defendants or some of them, the court erred in holding that Charles died seized of any interest in such property or of any interest therein in which the dower rights of plaintiff could attach.

64. After having held correctly that the joint tenancy
296 when created vests in each of the tenants a common right in the property which does not survive his death unless he becomes the last survivor of all the tenants and that then for the first time does that which before consisted in a practical sense of a life estate in the property become vested as an estate of inheritance—it erred in declaring and holding that Charles Fleming at the time of his decease was seized of an inheritable estate or seized of anything to which dower right of plaintiff could attach.

65. After having held correctly that under such a contract as the one at bar there is rather a falling away of the tenant from the estate than the passing of the estate to others—the court erred in holding that Charles Fleming at the time of his death was seized of any estate whatsoever to which the dower rights of plaintiff could attach.

66. After having held correctly that in a legal sense the death of Charles did not transfer rights which he possessed in the property to the surviving tenants, that his death did not enlarge or change the estate of Charles and that his death terminated the interest in

the estate—the court erred in holding that at the time of his decease Charles was seized of any estate whatsoever or of any estate to which the dower interest of plaintiff could attach.

67. After correctly holding that if the joint tenant died without disposing of his share the title to the thing which is the subject of joint tenancy remains in the survivor or survivors, free from the charge or moiety of one who dies—the court erred in holding that at the time of his decease Charles Fleming was seized of any estate whatever of an estate to which the dower right of plaintiff could attach.

297 68. Erred in holding that the Iowa statutes made dower rights impregnable, and that therefore dower attached, even if as a result of a survivorship contract the spouse dying first was seized of nothing at the time of his decense.

69. The Court erred in holding it to be material that "the theory of joint tenancy in a common law sense is not available to carry the appellants any further than the terms of their contract carry them."

70. After having held correctly that, "in the last analysis, therefore, we have before us a contract—nothing more, nothing less, and being a contract, it may be enforced as such unless there be some legal impediment thereto"—the court erred in holding that the contract at bar did not create a joint tenancy with the incident of survivorship, and erred in holding that despite such contract Charles Fleming died seized of some estate, or of an estate to which the dower rights of plaintiff could attach.

71. After correctly holding that the appellants have at least such rights as the terms of their contract give, the court erred in denying to them the relief stipulated for and all rights given by the terms of the contract.

72. Erred in holding that while, as must be true, such contracts as the one at bar are valid and effective as an abstraction, they yet were ineffective to bar dower rights of plaintiff.

73. Erred in holding that the survivorship contract was not a present disposition made in the lifetime.

74. The court erred in holding that when one joint tenant conveys his individual property in conformity with a contract of survivorship, that yet right of dower attached to the property so transferred.

298 75. After correctly holding that each joint tenant during life may dispose of his share by the usual modes of conveyance, the court erred in holding that Charles had not so disposed of his said share by means of the contracts at bar, and in holding that at the time of his death he was seized of any estate to which the dower right of plaintiff could attach.

76. The Court erred in holding that what was done here was a testamentary disposition, and in holding that what was done was such disposition of the property in which the deceased brother was in his life time jointly interested.

77. Erred in holding that here is a case wherein a husband was attempting to take from his wife any share in his estate accumulated

in his lifeime and left at his death, and in holding that there was any attempt to do such taking by any testamentary disposition.

78. The Court erred in holding that this was a testamentary disposition. For Charles Fleming made no transfer at all, much less one to become effective at the time of his death. He merely made a disposition in his life-time to the effect that if he died before said others did, he should never have any title.

79. The Court erred in holding that this was a testamentary disposition. For there was no agreement that the joint property should be vested in some one other than Charles at whatever time Charles died. On the contrary, it was an agreement that title should not vest fully in any one until three of the four had died; and no limitation upon disposition by said last survivor.

299 80. Having held that in joint tenancy there was no title in any tenant, and that on his death there was an exclusion or falling away from title, the court erred in holding that, yet, there was here a testamentary disposition, and an inheritable estate of which Charles Fleming died seized.

81. Erred in holding that these contracts were not effective for being, instead of an arrangement for the payment of the debts of a decedent a mere scheme to absorb the assets of his estate.

82. Erred in holding, first, that the writings at bar constituted a contract by Charles Fleming to make a will, and, second, in thereupon holding that if said writings were such contract they would be the equivalent of a will and thus an attempt by will to affect dower rights and the distributive share of plaintiff.

83. Erred in assuming that the writing at bar constituted a contract to make a will, and erred in proceeding from that erroneous assumption to hold further that a contract to make a will is the same as a will and that therefore here was an attempt to affect the distributive share and dower rights of plaintiff by means of a will.

84. Erred in assuming that the writings at bar constituted a contract on part of Charles Fleming to make a will, thereupon holding that such a contract could be enforced to the same extent as though Charles instead had made a will; and erred in holding upon these unfounded assumptions that the writings at bar constituted an effort to affect the dower rights or distributive share of plaintiff by means of a will.

300 85. The Court erred in holding, because the statutes of Iowa do not permit a will to diminish or cut off dower rights; that, therefore, the transaction here was a contract to make a will; holding that such contract was the equivalent of making a will and that, therefore, there was here nothing more than an ineffectual attempt to cut off dower by means of a will.

86. Erred in holding it to be material that Section 3376 of the Code of 1897 provides that a survivor's share can not be affected by any will of the spouse unless a stated consent is given in stated manner, within a stated time.

87. Erred in holding that the writings at bar were an attempt to deprive the plaintiff widow of her distributive share by means of a will on part of Charles Fleming.

88. The Court erred in holding that there was a partial failure of consideration.

89. The Court erred in holding under the pleadings in this suit that there was the right to pass on the question of whether there had been a partial failure of consideration, because under the issues and pleadings it is immaterial if true that there was a partial failure of consideration.

90. The Court erred in holding that these contracts are not sufficiently supported by a consideration, on the argument that said contracts could not possibly be performed, at least wholly.

301 91. The Court erred in holding that the alleged existence of the partnership prevented a holding as joint tenants such as cut off inheritable interest and in so doing departed from its decisions to the contrary expressed in *Paige vs. Paige*, 71 Iowa, 318, and in so doing erred in the construction of Section 2923 of the Code of 1897, departing in the instant case from the contrary decision in said *Paige* case, which decision was made prior to the time at which the contracts at bar were made.

92. The Court erred in holding that there has ever at any time been, either in the statute law or decisions of the Supreme Court of Iowa, anything forbidding the making of a survivorship arrangement between persons who in other respects were merely partners.

93. Section 2923 of the Code of 1897 was effective and in force prior to the time at which any of the contracts at bar were made, and has been in force ever since; and in holding in the instant case against the validity and effectiveness of said contracts the Court violated the provisions of that statute which reads that "conveyances to two or more in their own right create a tenancy in common unless a contrary intent is expressed," which said provision was construed by said Court in *Wood vs. Logue*, 167 Iowa, 441, to sanction and validate such contracts as the one at bar.

94. What is now Section 2923 of Code of 1897 has been in force from 1860 continually to this day. As construed in *Wood vs. Logue*, 167 Iowa, at 440, its provision that "conveyances to two or more in their own right create a tenancy in common unless a contrary intent is expressed," sanction and make valid such contracts as the one at bar—and the court erred in so disregarding the said statute and departing from its said construction as to hold in the instant suit that the contracts at bar are invalid and are no bar to an assertion of dower rights on part of plaintiff.

302 95. The Court erred in the instant case in construing Section 2923 of the Code of 1897, and in so erring departed from its decision in *Hoffman vs. Stiger*, 28 Iowa, 302, which last named decision was made prior to the time at which any of the contracts at bar were made.

96. The Court erred in departing in the instant case from the provisions of Section 2923 of the Code of 1897, which statute was in force at and before either of the contracts at bar were made and ever since, and in departing from the construction which said court had heretofore always given to said statute.

97. Erred in holding that there was any statute which took from

Charles Fleming the power to dispose of his personal property, with or without consideration, or in any manner that pleased him.

98. Erred in holding that while Charles Felming might dispose of his personal property in any way that pleased him, he could not dispose of same by such survivorship arrangement as he did become a party to.

99. The Court erred in departing from its former decisions made before these contracts were made and to the effect that as to personal property either spouse might make such disposition in his life-time as pleased him, and with or without consideration.

100. The Court erred in departing from the rule laid down by it in such cases as Haines vs. Harris, 33 Iowa, 516; Caruth's case, 128 Iowa, at 123, and Stahl vs. Brown, 72 Iowa, 720, wherein it is expressly held that the personal estate vests in the administrator during administration, and that "the heirs take no title to or ownership of the personal property of the estate while it is subject to administration; but it descends to the administrator upon his appointment,"—and which said decisions were all made at and before the making of either of the contracts at bar.

101. The Court erred in departing from its holding in Samson vs. Samson, 67 Iowa, 253, wherein it is expressly held that while Section 2436 of the Code of 1873 gives to the surviving widow a distributive share in the personal property of which her husband dies seized, that during his life time she had no inchoate right in such property, and he may make such disposition of it during his life-time as he sees fit; that if he sells it or makes any other disposition of it by which he is divested of the ownership, the wife has no claim upon it after his death, and that the law has placed no restriction or limitation on the power of the husband to make such disposition of his personal property during his life time as he may elect.

102. The Court erred in holding that either or both of the following statutes of Iowa had any application to the suit and issues at bar. Section 3362 Iowa Code, of 1897—"The personal property of the deceased not necessary for the payment of debts, nor otherwise disposed of, shall be distributed to the same persons and in the same proportions as though it were real estate.

Section 3376 of the Same Code.—"The survivor's share cannot be affected by any will of the spouse unless consent thereto be given within six months after a copy thereof has been served upon the survivor by the other parties interested in the estate, and notice that such survivor is required to elect whether consent thereto will be given, which consent when given shall be in open court or by a writing filed therein, which shall be entered on the proper records thereof;

but if at the expiration of six months no such election has 304 been made, it shall be conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder.

103. The Court erred in holding that in the decision at bar it had no purpose to overrule and did not overrule prior decisions of the Supreme Court of Iowa.

104. In the instant case the Court erroneously disregarded statutes

of Iowa in force and decisions of said Court rendered before said contracts were made.

105. Erred in holding that any statute provisions of the State of Iowa gave plaintiff any dower right, here—and holding that said sections of the Iowa statute, either or both together, have or had the effect that said contracts were no bar to dower right on part of plaintiff.

106. The Court erred in deciding that despite these contracts dower right attached, because in so holding it departed from earlier holdings by the same court to the contrary, which holdings were earlier than the making of the last contract.

107. The Court erred in departing from its former decisions and constructions of the Iowa statute made at and before the execution of the contracts at bar, all to the effect that such contracts as the one at bar were lawful, and that on the death of one party thereto the property, both real and personal, passed to the survivors and so on until the last survivor was reached.

108. The Court erred in departing from its own decision and its construction of the Iowa statute, which deciding and construing was had at and before when the contracts at bar were made, and which decisions and constructions were that such contracts were valid as to all the four signers thereof and all other persons including the plaintiff herein; which said departure was from its decision, for one in *Baker vs. Syfritt*, 147 Ia. 49.

305 109. Erred in holding that the decision of the Supreme Court of Iowa in *Stewart vs. Todd*, 190 Iowa, 283, is not applicable to and ought not to rule the cause at bar.

110. The Court erred in that its decision is but an oscillation; is a departure from its decisions at and before the contracts at bar were made and a like departure from its decision since the instant case was decided by it.—It having been the decision of the Court both before and since the contracts at bar were made that such contracts operated to create a joint tenancy with the incident of survivorship, and that when such contracts existed there was nothing to which dower right could attach.

111. Errred in that its said judgment and decision impairs the obligation of said contracts in violation of Article 1, Section 1 of the Constitution of the State of Iowa.

112. The court erred in that it's judgment and decision impairs the obligation of the contracts in controversy in violation of Article 1, Section 10 of the Constitution of the United States.

113. Erred in that its said judgment and decision deprives these petitioners and defendants of property without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

114. Erred in overruling the contention by defendants supported by the citation of *Muehlker vs. Railway*, 197 U. S. 544, to-wit: that the decision and decree violate the contract clause of the constitution of the United States, Article 1, Sec. 10, in that the court holds that a contract valid when made, going into effect instanter as an operating agreement, and providing for survivorship, and what is

essentially a joint tenancy is void because of a newly discovered public policy, newly and now for the first time declared, and 306 which is contrary to the former decisions of said court, and of the Supreme of the United States.

115. Erred in overruling the objection of defendants that the decree and decision deprived them of property without due process of law, in and for that the interest which the decree and decision create in the plaintiff, namely: about one-eighth of the joint estate, is to be and must be carved out of the estate which, pursuant to valid contracts (under law heretofore existing) vested in the defendants absolutely as against the plaintiff upon the death of Charles Fleming. This, in violation of the law of this State as settled in the authorities and statutes hereinbefore cited, and in contravention of the Constitution of the United States, 14th Amendment, Section 1.

116. Erred in that the said judgment and decisions made a change from constructions of statutes of the State of Iowa and from decisions all made before the contracts at bar were entered into, and making such change in decision retroactive and to destroy the validity of the contracts at bar though under such earlier constructions and decisions, said contracts were valid—all in violation of and contrary to the Muehlker case, 197 U. S. 544; Gelpke's case, Wall 194; Douglas Case, 101 U. S. 677; Loeb's case, 21 Sup. Ct. Rep. at 182; Taylor's case, 105 U. S. 72; De Bolt's case, 16 How. 425; Anderson's case, 6 Sup. Ct. Rep. 413; Lamson's case, 76 U. S. 485, 486; Burgess' case, 107 U. S. 33, 34; Havemeyer's case, 3 Wall 294; Mitchell's case, 4 Wall, 270; Rigg's case, 6 Wall, 106; Lee County's case, 7 Wall, 181; Chicago vs. Sheldon, 9 Wall 50; Oleott's case, 16 Wall, 678; Taleott's case, 86 U. S. at 678; Green's case, 3 Sup. Ct. Rep. 69; Butz's case, 75 U. S. 575; Aetna Co.'s case, 11 Sup. Ct. Rep. 215, 217; Groves' case, 15 Peters, 499; German Bank's case, 9 Sup. Ct. Rep. 163; Rohan's case, 46 U. S. at 38, 39; 307 Milwaukee Company's case, 40 Sup. Ct. Rep. 309; Antonio's case, 22 Sup. Ct. Rep. 95, 96; Traunenberger's case, 35 Sup. Ct. Rep. at 680; Willoughby's case, 235 U. S. 50; Tampa's case, 199 U. S. 243.

117. The Court erred in disregarding the numerous cases in the Supreme Court of the United States to the effect that even if the court of last resort is convinced it should overrule its former decisions, it must not make such reversal of opinion retroactive so as to affect contracts made before such change of opinion.

118. The Court erred in taking the position that it had not made such change in decision merely because it had overruled no case *ex nomine*—it being sufficient to invoke the Federal jurisdiction that said court had made, announced or approved some rule, doctrine or principle which at the time when the contracts were made sanctioned and validated same, and after such contracts were made had departed from or revoked such rule, doctrine, or principle, and thereby declared such contracts to be invalid and ineffective.

119. The Court erred in holding these contracts to be ineffective, despite the fact that when made, there was no Iowa decision in-

validating such contracts, and the law of the land then sanctioned them.

120. The Court erred in not holding that the widow knew of and acquiesced in and profited by the joint arrangement evidenced by those contracts, for many years, and in not holding that she should be held to be bound as by an estoppel.

308 The undersigned, therefore, pray that said judgment and decree of the Supreme Court of the State of Iowa may be reversed and that they may have such other relief as may be proper and just.

Albert B. Cummins, Clinton L. Nourse, and William E. Miller, Attorneys for Defendants, Appellants, and Plaintiffs in Error.

The above Assignment of Errors was presented to me with the petition for Writ of Error. The Clerk of the Supreme Court of the State of Iowa is directed to file the same as one of the papers in this proceeding, to procure Writ of Error.

Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa.

309 [File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

ORDER FOR TRANSCRIPT

[Filed Dec. 16, 1922]

Petitioners in error above named having obtained allowance of a writ of error to the Supreme Court of the United States, having given approved bond and having filed their assignment of errors, it is further ordered that the Clerk of this court shall forthwith certify the record, proceedings and orders made had or entered by certifying the paper which the parties to this cause have by their attorneys, stipulated and agreed is such record, proceedings and orders, and shall deliver said paper so certified to the attorneys of said petitioners for transmission to the Clerk of the Supreme Court of the United States—such certifying to be at the expense of said petitioners.

Dated December 15th A. D. 1922.

Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa.

310 [File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

ORDER GRANTING WRIT OF ERROR

[Filed Dec. 16, 1922]

Upon reading the petition and assignments of error of the above named Petitioners in Error, plaintiff and appellants, praying for the allowance of a Writ of Error from the Supreme Court of the United States to this court to review the judgment of this court heretofore rendered to-wit, on December 16, 1919, on December 20, 1920, on September 20, 1921, and on September 23, 1922, and it appearing from said petition and the record in this cause that a proper cause for the allowance of said writ is presented, it is ordered, that the same be, and is hereby allowed.

It is further considered, ordered and adjudged that the amount of security which the said plaintiff and appellee shall give and furnish upon said writ of error, be, and hereby is, fixed at (\$1,000) One Thousand Dollars, and that said security shall be by bond, conditioned according to law, and with sureties to be approved by the Chief Justice of the Supreme Court of the State of Iowa, and that upon the giving and approval of such bond, all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error in the Supreme Court of the United States.

Done this 15th day of December, A. D. 1922.

Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa.

311 [File endorsement omitted]

Certified Copy

In the Supreme Court of Iowa

[Title omitted]

BOND ON WRIT OF ERROR

[Filed Dec. 16, 1922]

Know all men by these presents, That We, Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Bros., and John A. Fleming, Administrator of the Estate of Charles Fleming, deceased, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto Anna B. Fleming, the plain-

tiff and appellee in the above entitled cause in the sum of One Thousand no/100 Dollars, lawful money of the United States of America, to payment of which well and truly to be made, the said principals and the said surety bind themselves and each of their successors, representatives and assigns, jointly and severally, firmly by these presents:

The conditions of this bond are such that whereas, in the above entitled cause, the Supreme Court of Iowa rendered its opinion and judgment on, to-wit, December 16, A. D., 1919 affirming the judgment of the District Court of Polk County, Iowa, in said cause, which was wholly adverse to these appellants, and

312 Whereas, The Supreme Court of the State of Iowa rendered its further and supplemental opinion and decision on, to-wit, December 20, 1920, denying the appellants' petition for rehearing theretofore filed, argued and submitted in said cause and in said supplemental opinion and decision, adhering to its decision affirming the judgment of the District Court of Polk County, Iowa, in said cause, and

Whereas, The Supreme Court of the State of Iowa on, to-wit, September 28, 1921, rendered its supplemental opinion, modifying and affirming its two former opinions rendered and entered, as aforesaid, in said cause and in said last named supplemental opinion overruled in part the objections and exceptions of the appellants, as set forth in their second petition for rehearing which had been filed in said court and cause February 17, 1921, and duly submitted to said court, and

Whereas, Appellants, having on November 25, A. D., 1921 filed in said court and cause their third petition for rehearing and which was thereafter duly submitted to said Supreme Court of Iowa, and the same was on, to-wit, September 23, A. D., 1922, overruled by said court without the filing of an opinion and on said last mentioned day and date, judgment was entered by said Supreme Court of Iowa, *accordingly*, — an order that procedendo and execution issue in said cause against these appellants, and

Whereas, said order and judgment to the Supreme Court of Iowa, of September 23, A. D., 1922, is final and conclusive as to the legal rights and obligations existing between the appellants and appellees except as to mere matters of accounting in the courts of the state of Iowa.

313 And the appellants, Robert J. Fleming, et al., having obtained a writ of error and filed a copy thereof in the office of the Clerk of the Supreme Court of the State of Iowa, to reverse the judgments and decisions in the aforesaid suit and a citation direct to the said Anna B. Fleming, citing and admonishing her to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date thereof:

Now, therefore, The condition of the obligation is such, that if the said Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Bros., and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Bros., John A. A. Fleming, Administrator of the Estate of Charles Fleming, Principals. American Surety Company of New York, by F. H. Noble, Resident Vice-President. R. W. Clearman, Resident Asst. Secretary, Des Moines, Iowa. [Seal of the American Surety Company, of New York.]

314 I approve the foregoing bond and sureties, this 15 day of December, A. D. 1922.

Truman S. Stevens, Chief Justice of the Supreme Court of Iowa.

315 [File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

Appeal from Polk District Court

CITATION AND SERVICE

[Filed Dec. 16, 1922]

To said Anna B. Fleming, plaintiff, appellee and defendant in Error:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within ninety days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Iowa, in which writ and in the above entitled cause Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, are the plaintiffs in error, and wherein you are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error — should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa, this 15th day of December, A. D. Nineteen Hundred Twenty-two.

316 And it is hereby ordered and directed that the aforesaid plaintiffs in error lodge the record herein in the office of the Clerk of the Supreme Court of the United States by or before the fifteenth day of January, A. D. Nineteen Hundred and Twenty-three.

Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa.

The undersigned, attorneys of record for the above named defendant in error, Anna B. Fleming, hereby admit that the above Citation was duly served on them on the 15th day of December, A. D. 1922, and they waive any further or different service thereof.

Parsons & Mills, J. M. Parsons, and Earl C. Mills, Attorneys for Anna B. Fleming, Plaintiff, Appellee and Defendant in Error.

317

[File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

Appeal from Polk District Court

CLERK'S CERTIFICATE

[Filed Dec. 16, 1922]

I, B. W. Garrett, Clerk of the Supreme Court of the State of Iowa, hereby certify that the words, figures and matters which precede this my certificate and to which said certificate is attached, are and comprise the record and proceedings made and had in the above entitled cause and in said Supreme Court as the same remains of record in my office, and I certify that said words, figures and matters are and comprise all and no more and no less than the parties to said cause have stipulated and agreed to be said records and proceedings. Preceding this certificate is found the original of said stipulation, and also the writ of error and the assignment of errors in the Supreme Court of the United States, and the Citation.

In witness whereof I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Iowa, at Des Moines, Iowa, this 15 day of December, A. D. 1922.

B. W. Garrett, Clerk of the Supreme Court
of Iowa. [Seal of the Supreme Court
of Iowa.]

Endorsed on cover: File No. 29,305. Iowa Supreme Court. Term No. 175. Robert J. Fleming, John A. Fleming, Stanhope Fleming, et al., etc., et al., plaintiffs in error, vs. Anna B. Fleming. Filed December 22d, 1922. File No. 29,305.